(22,298 and 22,299)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 123.

WILLIAM A. ENSIGN, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

No. 124.

CHARLES A. ENSIGN, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 19, 1912.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Commonwealth of Pennnsylvania and William A. Ensign wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction
2–5 of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said William A. Ensign as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, the 26th day of July, in the year of our Lord one thousand nine hundred and ten.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Commonwealth of Pennsylvania vs. William A. Ensign. Writ of Error.

* * * * * * *

6 Know all Men by these Presents, That we, William A. Ensign, as principal, and James A. Moorhead and Edward T. Moorhead, as sureties, are held and firmly bound unto the Commonwealth of Pennsylvania in the full and just sum of two thousand ($2000.00) dollars, to be paid to the said the Commonwealth of Pennsylvania, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of June, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a hearing in the Supreme Court of Pennsylvania in a suit depending in said Court, between the Commonwealth of Pennsylvania, as prosecutor, and William A. Ensign, defendant, a judgment was rendered against the said William A. Ensign and the said William A. Ensign having obtained writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said the Commonwealth of Pennsylvania citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said William A. Ensign, plaintiff in error, shall prosecute his writ of error to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM A. ENSIGN. [SEAL.]
JAMES A. MOORHEAD. [SEAL.]
EDWARD T. MOORHEAD. [SEAL.]

Sealed and delivered in presence of—

S. H. WILLIS.
H. H. LEET.
JNO. R. McDONALD.

Approved by—

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

I hereby approve this as a supersedeas bond.

W. PITT GIFFORD,
Dist. Att'y of Erie County.

[Endorsed:] Commonwealth of Pennsylvanian vs. William A. Ensign. Bond.

7 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Commonwealth of Pennsylvania and Charles A. Ensign wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction
8–33 of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Charles A. Ensign as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, the 26th day of July, in the year of our Lord one thousand nine hundred and ten.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Commonwealth of Pennsylvania vs. Charles A. Ensign. Writ of Error.

* * * * * * *

34–42 In the Court of Quarter Sessions of Erie County, Pa., Of September Sessions, 1908.

No. 39.

COMMONWEALTH
vs.
WM. A. ENSIGN, CHAS. A. ENSIGN.

Indictment, Embezzlement.

True Bill Nov. 20th, 1908. Defendants plead not Guilty. Tried by Jury and verdict Guilty.

JANUARY 11TH, 1909.

And now, the Court sentence the defendants Wm. A. Ensign and Chas. A. Ensign, to pay a fine of Two thousand dollars each to the Commonwealth, (for the use of the Erie County Law Library,) pay the costs of prosecution, to restore the property taken, if not actually done, or pay the value thereof to the owner thereof, and each undergo an imprisonment in the Western Penitentiary, of Pennsylvania, (situate in the county of Allegheny,) by separate or solitary confinement at labor, for and during the period of one year to be computed from this date there to be kept, fed, clothed and treated as the law directs, and stand committed until the sentence be complied with.

BY THE COURT.

Endorsement: No. 39. Sept. Sessions, 1908—Commonwealth vs. Wm. A. Ensign and Chas. A. Ensign—Western Penitentiary.—Sentence.—Filed in Clerk of Court's Office Jan. 11, 1909—Erie Co. Pa.

* * * * * * *

43 In the Superior Court of Pennsylvania, April Term, 1909.

Filed July 14, 1909.

No. 162.

COMMONWEALTH
vs.
WILLIAM A. ENSIGN.

Appeal Q. S. Erie Co.

RICE, *P. J.*:

The principal question for decision is, whether upon the trial of an indictment, drawn under the Act of May 9, 1889, P. L. 145, charging the receiving of deposits by an insolvent banker, with knowledge that he is at the time insolvent, schedules filed by the defendant in involuntary bankruptcy, and testimony of an expert ac-

countant based upon an examination of his banking books that he had turned over to the trustee in bankruptcy, are admissible against him. What we shall say regarding the evidence furnished by the schedules will apply with equal force to the objection that the evidence furnished by the books could not be used against the defendant.

First. Section 860 of the Revised Statutes of the United States is as follows: "No pleading of a party, nor any discovery or evidence, obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or foreiture; provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid." The terms "any court of the United States" obviously mean any federal court, and therefore this section of the revised statutes and the decisions under it may be dismissed as inapplicable to
44 the present case.

Second. Clause 8 of section 7 of the bankruptcy act of 1898 provides that the bankrupt, whether voluntary or involuntary, shall prepare, make oath to, and file in court a schedule of his property, showing certain facts in detail. Clause 9 of the same section provides that when present at the first meeting of his creditors, and at such other times as the court shall order, he shall submit to an examination of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and in addition, all matters which may affect the administration and settlement of his estate. Immediately following these provisions relating to the examination of the bankrupt and forming part of the same clause is the proviso, "but no testimony given by him shall be offered in evidence against him in any criminal proceeding." In a well considered opinion overruling the defendant's motion for new trial and in arrest of judgment the learned trial judge likened the schedule to a statement of claim, a bill of particulars, or an affidavit of defense, which are not ordinarily part of the testimony in a case unless offered as such, and upon consideration of the immediate context held, that the proviso above quoted refers to the testimony given by the bankrupt upon his examination and not to the matters set out in the earlier parts of the section. We concur in this conclusion.

Third. Counsel contend that the use of the schedule and the books in this trial was in violation of the defendant's rights under the provision of the federal constitution, that no person "shall be compelled
in any criminal case to be a witnes against himself," and the
45 provision of the state constitution that in criminal prosecutions the accused "cannot be compelled to give evidence against himself." It is to be observed that the commonwealth did not obtain these documents by any compulsion exerted by it upon the defendant. But it is said the schedules were filed and the books were delivered to the trustee by compulsion of the provisions of the bankruptcy law and of the General Orders in bankruptcy, and there-

fore they could not be used in any criminal prosecution of the defendants either in the state courts or in the United States Courts. It is to be observed in this connection, (1) that the bankruptcy act attaches no penalty to the bankrupt's failure to file the schedule; (2) that the schedules involved in the present case were not filed under compulsion of any special decree or order of court or of any attachment or proceeding for attachment; (3) that the defendants did not object to filing them upon the ground that thereby they would furnish evidence that might criminate them; (4) that they did not file them under the inducement of any provision of any act of Congress or of the state legislature prohibiting them from being used against them in any criminal prosecution in the state courts; (5) that it does not appear that at the time they filed them they were under arrest or had been charged with a criminal offense or were under any sort of duress. Generally speaking, and in the absence of statutory regulation on the subject, testimony and written statements voluntarily given or made by a party or witness in a judicial proceeding, are as admissions and confessions competent against him on the trial of any issue in a criminal case to which they are pertinent, and, according to the great weight of authority such statements and testimony are considered voluntary when given or made under the circumstances above enumerated: Wharton Crim. Ev. sec. 664;
46 Roscoe Crim. Ev. vol. 1, page 82, 245 (8th ed.); Greenleaf on Ev. vol. 1, sec. 225. Williams v. Com. 29 Pa. 102; Hendrickson v. People, 10 N. Y. 13; Com. v. Reynolds, 122 Mass. 454; Vermont v. Duncan, 4 L. R. A., N. S. 1144 note; People v. Wieger, 100 Cal. 352. In addition to these authorities cited by the Commonwealth's counsel we may mention Abbott v. People, 75 N. Y. 602; Com. v. Doughty, 139 Pa. 383; Com. v. House, 6 Pa. Superior Ct. 92. It follows that the court did not commit error in admitting the papers and testimony referred to in the first two assignments of error.

The order of reference quoted in the third assignment of error was under the seal of the United States District Court for the proper district, was forwarded by the clerk of said court to the referee in bankruptcy, and was produced and identified by him who was the legal custodian of the document. The objection made to its admission does not satisfactorily show that it was objected to on the ground that it was not properly executed or proven. But the objection seems to have been based on the ground "that it is another piece of 'testimony' growing out of the bankruptcy proceedings." Under the circumstances, no error was committed in admitting the paper.

All the assignments of error are overruled, the judgment is affirmed and the record is remitted to the court of quarter sessions of Erie county to the end that the sentence be fully carried into effect.

47 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, George Pearson, Prothonotary, of the Superior Court of Pennsylvania, sitting at Pittsburgh, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of Commonwealth vs. Wm.

A. Ensign et al. at No. 162 of April Term, 1909, as full, entire and complete as the same remains on file in the said Superior Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburgh, in the County of Allegheny, this 24th day of July in the year of our Lord one thousand nine hundred and nine.

[SEAL.]

GEORGE PEARSON,
Prothonotary.

Endorsement: Exemplification—Filed in Clerk of Court's Office Erie Co. Pa., Jul- 26, 1909.

48 In the Superior Court of Pennsylvania, April Term, 1909.

Filed July 14, 1909.

No. 163.

COMMONWEALTH
vs.
CHARLES A. ENSIGN.

Appeal Q. S. Erie Co.

RICE, *C. J.:*

The defendant was tried jointly with William A. Ensign, in whose case we herewith file an opinion covering all of the questions involved in this appeal. The judgment is affirmed and the record is remitted to the court of quarter sessions of Erie county to the end that the sentence be fully carried into effect.

49–59 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, George Pearson, Prothonotary, of the Superior Court of Pennsylvania, sitting at Pittsburgh, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of Commonwealth vs. Wm. A. Ensign et al. at No. 163 of April Term, 1909, as full, entire and complete as the same remains on file in the said Superior Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburg, in the County of Allegheny,

this 24" day of July in the year of our Lord one thousand nine hundred and nine.

[SEAL.] GEORGE PEARSON,
Prothonotary.

Endorsement: Exemplification—Filed in Clerk of Court's Office Erie Co. Pa. Jul- 26, 1909.

* * * * * * *

60–70 In the Supreme Court of Pennsylvania, Eastern District.

Docket Entries.

No. 318, January Term, 1909.

(Q. S. Erie.)

	Commonwealth of Pennsylvania, Plaintiff,	Appeal from the Superior Court.
	v.	Filed October 2, 1909.
318.	William A. Ensign, Defendant.	Eo die Certiorari exit.
Benson,		Ret'ble fourth Monday of
Brooks	Appeal of Defendant.	April, 1910.
& English.	No. 39, September Term, 1908, from the judgment.	March 31, 1910, Record returned & filed.
		Eo die Assignments of error filed.
		April 18, 1910, Assignments of error filed.
		September 24, 1909, Appeal allowed.—Per Curiam.
	Superior Court.	April 25, 1910, Argued.
	No. 162, April Term, 1909, from the decision and decree affirming the judgment of the Court of Quarter Sessions of Erie County.	May 24, 1910, Judgment affirmed.—Per Curiam.
		May 31, 1910, Remittitur exit and with record sent to —— ——, Prothonotary of Erie County.
		June 13, 1910, Petition for writ of error filed.—Benson, Brooks & English.
		July 8, 1910, No federal question appearing, the application for an appeal is refused.—Per Curiam.

* * * * * * *

71 *Assignments of Error.*

First Assignment of Error.

The Superior Court erred in overruling Appellants' First Assignment of Error, which is as follows:

"The Court erred in admitting as evidence of the insolvency of the defendants at the time of receiving the deposit on February 12, 1908, the schedules in bankruptcy and signed by the defendants, involuntary bankrupts, on the 30th day of April, 1908.

There were three separate schedules:

The individual schedule of W. A. Ensign, which showed a total indebtedness of $4,038.39, and total assets of $1,930.00. as shown by the summary of debts and assets. See appendix, Page- 57 and 58.

The individual schedule of Charles A. Ensign, which showed a total indebtedness of $639.45 and total assets of $1,205.37, as shown by summary of debts and assets. See Appendix, Page- 59 and 60.

The schedule of W. A. Ensign and Charles A. Ensign, partners, which showed a total indebtedness of $73,932.14, and total assets of $26,765.19, as shown by the summary of debts and assets. See Appendix, Page- 61 and 62.

"Commonwealth offers the Schedules in Bankruptcy in evidence accompanied by an offer to follow that evidence with proof that the same condition of insolvency disclosed in the schedules existed on the day that the deposit in question was received. Objected to the offer of any of the schedules in bankruptcy or to the offer of any evidence taken before the Referee in Bankruptcy, or any other matter that appears as evidence against the defendants that they were compelled to produce acting under the direction of the United States statute in regard to bankruptcy; on the ground that a man cannot be compelled to furnish evidence against himself.

The COURT: That Act says that his testimony shall not be offered against him. In my opinion the schedules filed in this case
72 are competent evidence. I don't know that this precise question has been decided by the court, heretofore. But I believe, on principle, and on authorities, so far as we have been able to examine the authorities in Pennsylvania, that in the State Court those schedules are competent evidence whatever the rule might be in the U. S. Court.

The rule in Pennsylvania has not been held quite as strict in excluding testimony obtained in other judicial investigations as it has in the United States Court. For example, in the proceedings in the State Court for violation of the election laws, a party may be compelled to testify. That has been decided by the Supreme Court in the case of Kelly's Appeal, 290 Penna. page 430. Also in the case of Commonwealth vs. John Gibbons, 9th Superior Court, page 527.

142 U. S. page 547 does not apply in proceedings in the State Courts, under a State statute.

Objected to further, that the bankrupt law provides that no testi-

mony given by a party shall be offered in evidence against him in any criminal proceeding. That it is contrary to public policy and in contravention of the constitutional rights of the defendant, and in violation of the statutes of the United States.

Objections overruled and exception sealed for the defendants.

EMORY A. WALLING, *P. J.* [SEAL.]

(The schedules are received.)

The COURT: I am not prepared to hold that schedules filed by a bankrupt, whether voluntary or involuntary, would be considered as "testimony" within that provision. See Appendix, Page 36."

Second Assignment of Error.

The Superior Court erred in overruling Appellants' Second Assignment of Error, which is as follows:

73 "The Court erred in admitting in evidence statements and compilations made by an accountant from the private banking books of the defendants which had been turned over to the trustee in the involuntary bankruptcy proceedings and produced in court by the trustee. *

A. I. LOOP testified:

Q. You are trustee for W. A. Ensign and Charles A. Ensign, in bankruptcy?

A. Yes, sir.

Q. In your capacity as trustee state whether or not you took possession of the books and papers of the bank?

A. Yes, sir.

(Refers to books on table.)

Q. State whether they are books of the bank?

A. Yes, sir.

(See Appendix, Page 28.)

Mr. CHARLES P. RILEY being examined, testified:

Q. Now state whether you have made a comparison of the Assets and Liabilities schedules in the Bankruptcy Schedules in the Ensign case, with the books of the bank, on the 15th of February, 1908?

A. I have.

Q. What do you say as to whether or not the schedules are made up from the books, of the 15th of February, 1908?

Objected to.

Offered to show that it revealed the condition of the bank on the 15th of February; that there was no Liabilities or Assets acquired after that date.

Objected to.

Objection overruled, and exception sealed for the defendants.

EMORY A. WILLING, *P. J.* [SEAL.]

A. They are taken from the books of W. A. Ensign & Son at the close of business February 15th, and the schedules made up from them.

Q. Have you made an examination of the condition of the bank of W. A. Ensign & Son on the 12th of February, 1908?

74 A. I have.

Q. What do you find their condition to be on that day?

A. I find them to be insolvent on that day, to the extent of about fifty thousand dollars.

Objected to, and defendants' counsel asks that the answer be stricken out.

The COURT:

Q. That is your conclusion from the examination of the books of the bank?

A. Yes, sir.

(See Appendix, Page 42.)

On cross-examination by Mr. BROOKS, he testified:

Q. When did you make this examination of the books?
A. A week ago; of the books.
Q. Where did you make it?
A. At the District Attorney's office."

See Appendix, Page 42.)

Third Assignment of Error.

The Superior Court erred in overruling Appellants' Third Assignment of Error, which is as follows:

The Court erred in admitting the copy of the "Order of Reference" in the bankruptcy case, as evidence of the insolvency of the defendants, or for any other purpose. The following is a copy:

EXHIBIT H.

In the District Court of the United States for the Western District of Pennsylvania.

No. 3984. In Bankruptcy.

In the Matter of WILLIAM A. ENSIGN and CHARLES A. ENSIGN, Partners, Doing Business as W. A. Ensign & Son.

75 At the City of Pittsburg, in said District, this 28th Day of April, A. D. 1908.

Whereas, William A. Ensign and Charles A. Ensign, partners, doing business as W. A. Ensign & Son, in the County of Erie, and District aforesaid, on the 28th day of April, A. D. 1908, were duly adjudged bankrupts upon a petition filed in this court against them on the

24th day of February, A. D. 1908, according to the provisions of the Acts of Congress relating to bankruptcy.

It is thereupon ordered that the said matters be referred to J. M. Force, Esq., one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that said bankrupt shall attend before said Referee on the 5th day of May, 1908, at Erie, and thenceforth shall submit to such orders as may be made by said Referee, or by this Court, relating to said bankruptcy.

Witness my hand and the seal of the said Court, at Pittsburg, in said District, on the 28th day of April, A. D. 1908.

[SEAL.] WM. T. LINDSEY, *Clerk*.

Indorsed copy of Order of Reference.

(See Appendix, Page 63.)

District Attorney offers the copy of the Order of Reference in the bankruptcy case (to show the date of the adjudication and the fact of the adjudication) of W. A. Ensign and Charles A. Ensign, partners, doing business as W. A. Ensign & Son.

Objected to as incompetent; and that it is another piece of "testimony" growing out of the bankruptcy proceedings.

The COURT: It seems to be a copy of the U. S. Court Record under the seal of the Court, to which I think we should give full faith and credit.

Objection overruled and evidence admitted and exception sealed for the defendants.

EMORY A. WALLING, *P. J.* [SEAL.]

76 The paper is marked Exhibit "H."

(See Appendix, Page 63.)

Fourth Assignment of Error.

The Superior Court erred in overruling Appellants' Fourth Assignment of Error, which is as follows:

Order of Court: And now, January 4th, 1909, the rule for a new trial and in arrest of judgment in above stated case is discharged.

PER CURIAM.

(See Page 18.)

Fifth Assignment of Error.

The Superior Court erred in not setting aside the sentence of the court below, which is as follows:

"And now, January 11th, 1909, the Court sentence the defendants, William A. Ensign and Charles A. Ensign, to pay a fine of Two Thousand Dollars each to the Commonwealth (for the use of the Erie County Law Library), pay the costs of the prosecution, to restore the property taken, if not already done, or pay the value thereof to the owner thereof, and each undergo an imprisonment in the Western Penitentiary of Pennsylvania (situate in the County of Allegheny) by separate or solitary confinement at labor, for and

during the period of one year, to be computed from this date, there to be kept, fed, clothed and treated as the law directs, and stand committed until the sentence be complied with."

BY THE COURT.

(Signed) BENSON, BROOKS & ENGLISH,
PAUL A. BENSON,
JOHN B. BROOKS,
CHARLES H. ENGLISH,
Attorneys for Appellants.

Endorsement: #318 & 319, Jan'y Term, 1909—Supreme Court—#39 September Session 1908.—Commonwealth of Penna. vs. William A. Ensign and Charles A. Ensign—Assignments of Error—Filed Mar. 31, 1910—in Supreme Court—B. B. & E.

77 *Assignments of Error.*

First Assignment of Error.

The Superior Court erred in overruling Appellants' First Assignment of Error, which is as follows:

"The Court erred in admitting as evidence of the insolvency of the defendants at the time of receiving the deposit on February 12, 1908, the schedules in bankruptcy and signed by the defendants, involuntary bankrupts, on the 30th day of April, 1908.

There were three separate schedules:

The individual schedule of W. A. Ensign, which showed a total indebtedness of $4,038.39, and total assets of $1,930.00 as shown by the summary of debts and assets. See Appendix, Page- 57 and 58.

The individual schedule of Charles A. Ensign, which showed a total indebtedness of $669.45 and total assets of $1,205.37, as shown by summary of debts and assets. See Appendix, Page- 59 and 60.

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"Commonwealth offers the Schedules in Bankruptcy in evidence accompanied by an offer to follow that evidence with proof that the same condition of insolvency disclosed in the schedules existed on the day that the deposit in question was received.

Objected to the offer of any of the schedules in bankruptcy or to the offer of any evidence taken before the Referee in Bankruptcy, or any other matter that appears as evidence against the defendants that they were compelled to produce acting under the direction of the United States statute in regard to bankruptcy; on the ground that a man cannot be compelled to furnish evidence against himself.

The COURT: That Act says that his testimony shall not be offered against him. In my opinion the schedules filed in this case
78 are competent evidence. I don't know that this precise question has been decided by the court, heretofore. But I

believe, on principle, and on authorities, so far as we have been able to examine the authorities in Pennsylvania, that in the State Court those schedules are competent evidence whatever the rule might be in the U. S. Court.

The rule in Pennsylvania has not been held quite as strict in excluding testimony obtained in other judicial investigations as it has in the United States Court. For example, in the proceedings in the State Court for violation of the election laws, a party may be compelled to testify. That has been decided by the Supreme Court in the case of Kelly's Appeal, 290 Penna. page 430. Also in the case of Commonwealth vs. John Gibbons, 9th Superior Court, page 527.

142 U. S. page 547 does not apply in proceedings in the State Courts, under a State statute.

Objected to further, that the bankrupt law provides that no testimony given by a party shall be offered in evidence against him in any criminal proceeding. That it is contrary to public policy and in contravention of the constitutional rights of the defendant, and in violation of the statutes of the United States.

Objections overruled and exception sealed for the defendants.

EMORY A. WALLING, *P. J.* [SEAL.]

(The schedules are received.)

The COURT: I am not prepared to hold that schedules filed by a bankrupt, whether voluntary or involuntary, would be considered as "testimony" within that provision. See Appendix, Page 36."

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and Liabilities schedules in the Bankruptcy Schedules in the Ensign case, with the books of the bank, on the 15th of February, 1908?

A. I have.

Q. What do you say as to whether or not the schedules are made up from the books, of the 15th of February, 1908?

Objected to.

Offered to show that it revealed the condition of the bank on the 15th of February; that there was no Liabilities or Assets acquired after that date.

Objected to.

Objection overruled, and exception sealed for the defendants.

EMORY A. WALLING, *P. J.* [SEAL.]

A. They are taken from the books of W. A. Ensign & Son at the close of business February 15th, and the schedules made up from them.

Q. Have you made an examination of the condition of the bank of W. A. Ensign on the 12th of February, 1908?

A. I have.

Q. What do you find their condition to be on that day?

A. I find them to be insolvent on that day, to the extent of about fifty thousand dollars.

80 Objected to, and defendants' counsel asks that the answer be stricken out.

The COURT:

Q. That is your conclusion from the examination of the books of the bank?

A. Yes, sir.

(See Appendix, Page 42.)

On cross-examination by Mr. BROOKS, he testified:

Q. When did you make this examination of the books?

A. A week ago; of the books.

Q. Where did you make it?

A. At the District Attorney's office."

(See Appendix, Page 42.)

Third Assignment of Error.

The Superior Court erred in overruling Appellants' Third Assignment of Error, which is as follows:

The Court erred in admitting the copy of the "Order of Reference" in the bankruptcy case, as evidence of the insolvency of the defendants, or for any other purpose. The following is a copy:

EXHIBIT H.

In the District Court of the United States for the Western District of Pennsylvania.

No. 3984. In Bankruptcy.

In the Matter of WILLIAM A. ENSIGN and CHARLES A. ENSIGN, Partners, Doing Business as W. A. Ensign & Son.

At the City of Pittsburg, in said District, this 28th Day of April, A. D. 1908.

Whereas, William A. Ensign and Charles A. Ensign, partners doing business as W. A. Ensign & Son, in the County of Erie, and District aforesaid, on the 28th day of April, A. D. 1908, were duly adjudged bankrupts upon a petition filed in this court against
81 them on the 24th day of February, A. D. 1908, according to the provisions of the Acts of Congress relating to bankruptcy.

It is thereupon ordered that the said matters be referred to J. M. Force, Esq., one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that said bankrupt shall attend before said Referee on the 5th day of May, 1908, at Erie, and thenceforth shall submit to such orders as may be made by said Referee, or by this Court, relating to said bankruptcy.

Witness my hand and the seal of the said Court, at Pittsburg, in said District, on the 28th day of April, A. D. 1908.

[SEAL.] WM. T. LINDSEY, *Clerk.*

Indorsed copy of Order of Reference.

(See Appendix, Page 63.)

District Attorney offers the copy of the Order of Reference in the bankruptcy case (to show the date of the adjudication and the fact of the adjudication) of W. A. Ensign and Charles A. Ensign, partners, doing business as W. A. Ensign & Son.

Objected to as incompetent; and that it is another piece of "testimony" growing out of the bankruptcy proceedings.

The COURT: It seems to be a copy of the U. S. Court Record under the seal of the Court, to which I think we should give full faith and credit.

Objection overruled and evidence admitted and exception sealed for the defendants.

EMORY A. WALLING, *P. J.* [SEAL.]

The paper is marked Exhibit "H."

(See Appendix, Page 63.)

Fourth Assignment of Error.

The Superior Court erred in overruling Appellants' Fourth Assignment of Error, which is as follows:

82 Order of Court: And now, January 4th, 1909, the rule for a new trial and in arrest of judgment in above stated case is discharged.

PER CURIAM.

(See Page 18.)

Fifth Assignment of Error.

The Superior Court erred in not setting aside the sentence of the court below, which is as follows:

"And now, January 11th, 1909, the Court sentence the defendants, William A. Ensign and Charles A. Ensign, to pay a fine of Two Thousand Dollars each to the Commonwealth (for the use of the Erie County Law Library), pay the costs of the prosecution, to restore the property taken, if not already done, or pay the value thereof to the owner thereof, and each undergo an imprisonment in the Western Penitentiary of Pennsylvania (situate in the County of Allegheny) by separate or solitary confinement at labor, for and during the period of one year, to be computed from this date, there to be kept, fed, clothed and treated as the law directs, and stand committed until the sentence be complied with."

BY THE COURT.

(Signed) PAUL A. BENSON,
JOHN B. BROOKS,
CHARLES H. ENGLISH,
Attorneys for Appellants.

Endorsement: No. 318, January Term, 1909—Commonwealth vs. William A. Ensign—Assignments of Error—Filed Apr. 18, 1910—in Supreme Court.

83–90 In the Supreme Court of Pennsylvania, Eastern District.

Docket Entries.

No. 319, January Term, 1909.

(Q. S. Erie.)

	Commonwealth of Pennsylvania, Plaintiff,	Appeal from the Superior Court.
	v.	Filed October 2, 1909.
319.	Charles A. Ensign, Defendant.	Eo die Certiorari exit.
Benson, Brooks & English.	Appeal of Defendant.	Ret'ble fourth Monday of April, 1910.
	No. 39, September Term, 1908, from the judgment.	March 31, 1910, Record returned & filed.
		Eo die Assignments of error filed.
		April 18, 1910, Assignments of error filed.
		September 24, 1909, Appeal allowed.—Per Curiam.
	Superior Court.	April 25, 1910, Argued.
	No. 163, April Term, 1909, from the decision and decree affirming the judgment of the Court of Quarter Sessions of Erie County.	May 24, 1910, Judgment affirmed.—Per Curiam.
		May 31, 1910, Remittitur exit and with record sent to —— ——, Prothonotary of Erie County.
		June 13, 1910, Petition for writ of error filed.—Benson, Brooks & English.
		July 8, 1910, No federal question appearing, the application for an appeal is refused.—Per Curiam.

* * * * * * *

91 *Assignments of Error.*

First Assignment of Error.

The Superior Court erred in overruling Appellants' First Assignment of Error, which is as follows:

"The Court erred in admitting as evidence of the insolvency of the defendants at the time of receiving the deposit on February 12, 1908, the schedules in bankruptcy and signed by the defendants, involuntary bankrupts, on the 30th day of April, 1908.

There were three separate schedules:

The individual schedule of W. A. Ensign, which showed a total

indebtedness of $4,038.39, and total assets of $1,930.00, as shown by the summary of debts and assets. See Appendix. Page- 57 and 58.

The individual schedule of Charles A. Ensign, which showed a total indebtedness of $669.45 and total assets of $1,205.37, as shown by summary of debts and assets. See Appendix, Page- 59 and 60.

The schedule of W. A. Ensign and Charles A. Ensign, partners, which showed a total indebtedness of $73,932.14, and total assets of $26,765.19, as shown by the summary of debts and assets. See Appendix, Page- 61 and 62.

"Commonwealth offers the Schedules in Bankruptcy in evidence accompanied by an offer to follow that evidence with proof that the same condition of insolvency disclosed in the schedules existed on the day that the deposit in question was received. Objected to the offer of any of the schedules in bankruptcy or to the offer of any evidence taken before the Referee in Bankruptcy, or any other matter that appears as evidence against the defendants that they were compelled to produce acting under the direction of the United States statute in regard to bankruptcy; on the ground that a man cannot be compelled to furnish evidence against himself.

The COURT: That Act says that his testimony shall not be offered against him. In my opinion the schedules filed in this case
92 are competent evidence. I don't know that this precise question has been decided by the court, heretofore. But I believe, on principle, and on authorities, so far as we have been able to examine the authorities in Pennsylvania, that in the State Court those schedules are competent evidence whatever the rule might be in the U. S. Court.

The rule in Pennsylvania has not been held quite as strict in excluding testimony obtained in other judicial investigations as it has in the United States Court. For example, in the proceedings in the State Court for violation of the election laws, a party may be compelled to testify. That has been decided by the Supreme Court in the case of Kelly's Appeal, 290 Penna. page 430. Also in the case of Commonwealth vs. John Gibbons, 9th Superior Court, Page 527.

142 U. S. page 547 does not apply in proceedings in the State Courts, under a State statute.

Objected to further, that the bankrupt law provides that no testimony given by a party shall be offered in evidence against him in any criminal proceeding. That it is contrary to public policy and in contravention of the constitutional rights of the defendant, and in violation of the statutes of the United States.

Objections overruled and exception sealed for the defendants.

EMORY A. WALLING, *P. J.* [SEAL.]

(The schedules are received.)

The COURT: I am not prepared to hold that schedules filed by a bankrupt, whether voluntary or involuntary, would be considered as "testimony" within that provision. See Appendix, Page 36."

Second Assignment of Error.

The Superior Court erred in overruling Appellants' Second Assignment of Error, which is as follows:

"The Court erred in admitting in evidence statements and
93 compilations made by an accountant from the private banking books of the defendants which had been turned over to the trustee in the involuntary bankruptcy proceedings and produced in court by the trustee.

A. I. LOOP testified:

Q. You are trustee for W. A. Ensign and Charles A. Ensign, in bankruptcy?
A. Yes, sir.
Q. In your capacity as trustee state whether or not you took possession of the books and papers of the bank?
A. Yes, sir.

(Refers to books on table.)

Q. State whether they are books of the bank?
A. Yes, sir.

(See Appendix, Page 28.)

Mr. CHARLES P. RILEY being examined, testified:

Q. Now state whether you have made a comparison of the Assets and Liabilities schedules in the Bankruptcy Schedules in the Ensign case, with the books of the bank, on the 15th of February, 1908?
A. I have.
Q. What do you say as to whether or not the schedules are made up from the books, of the 15th of February, 1908?

Objected to.
Offered to show that it revealed the condition of the bank on the 15th of February; that there was no Liabilities or Assets acquired after that date.
Objected to.
Objection overruled, and exception sealed for the defendant.
EMORY A. WALLING, *P. J.* [SEAL.]

A. They are taken from the books of W. A. Ensign & Son at the close of business February 15th, and the schedules made up from them.

Q. Have you made an examination of the condition of the
94 bank of W. A. Ensign & Son on the 12th of February, 1908?
A. I have.
Q. What do you find their condition to be on that day?
A. I find them to be insolvent on that day, to the extent of about fifty thousand dollars.

Objected to, and defendants' counsel asks that the answer be stricken out.

The COURT:

Q. That is your conclusion from the examination of the books of the bank?
A. Yes, sir.

(See Appendix, Page 42.)

On cross-examination by Mr. BROOKS, he testified:

Q. When did you make this examination of the books?
A. A week ago; of the books.
Q. Where did you make it?
A. At the District Attorney's office."

(See Appendix, Page 42.)

Third Assignment of Error.

The Superior Court erred in overruling Appellants' Third Assignment of Error, which is as follows:

The Court erred in admitting the copy of the "Order of Reference" in the bankruptcy case, as evidence of the insolvency of the defendants, or for any other purpose. The following is a copy:

EXHIBIT H.

In the District Court of the United States for the Western District of Pennsylvania.

No. 3984. In Bankruptcy.

In the Matter of WILLIAM A. ENSIGN and CHARLES A. ENSIGN, Partners, Doing Business as W. A. Ensign & Son.

95 At the City of Pittsburg, in said District, this 28th Day of April, A. D. 1908.

Whereas, William A. Ensign and Charles A. Ensign, partners doing business as W. A. Ensign & Son, in the County of Erie, and District aforesaid, on the 28th day of April, A. D. 1908, were duly adjudged bankrupts upon a petition filed in this court against them on the 24th day of February, A. D. 1908, according to the provisions of the Acts of Congress relating to bankruptcy.

It is thereupon ordered that the said matters be referred to J. M. Force, Esq., one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that said bankrupt shall attend before said Referee on the 5th day of May, 1908, at Erie, and thenceforth shall submit to such orders as may be made by said Referee, or by this Court, relating to said bankruptcy.

Witness my hand and the seal of the said Court, at Pittsburg, in said District, on the 28th day of April, A. D. 1908.

WM. T. LINDSEY, *Clerk.*

[SEAL.]

Indorsed copy of Order of Reference.
(See Appendix, Page 63.)

District Attorney offers the copy of the Order of Reference in the bankruptcy case (to show the date of the adjudication and the fact of the adjudication) of W. A. Ensign and Charles A. Ensign, partners, doing business as W. A. Ensign & Son.

Objected to as incompetent; and that it is another piece of "testimony" growing out of the bankruptcy proceedings.

The COURT: It seems to be a copy of the U. S. Court Record under the seal of the Court, to which I think we should give full faith and credit.

Objection overruled and evidence admitted and exception sealed for the defendants.

EMORY A. WALLING, *P. J.* [SEAL.]

The paper is marked Exhibit "H."
(See Appendix, Page 63.)

96–234 Fourth Assignment of Error.

The Superior Court erred in overruling Appellants' Fourth Assignment of Error, which is as follows:

Order of Court: And now, January 4th, 1909, the rule for a new trial and in arrest of judgment in above stated case is discharged.

PER CURIAM.

(See Page 18.)

Fifth Assignment of Error.

The Superior Court erred in not setting aside the sentence of the court below, which is as follows:

"And now, January 11th, 1909, the Court sentence the defendants, William A. Ensign and Charles A. Ensign, to pay a fine of Two Thousand Dollars each to the Commonwealth (for the use of the Erie County Law Library), pay the costs of the prosecution, to restore the property taken, if not already done, or pay the value thereof to the owner thereof, and each undergo an imprisonment in the Western Penitentiary of Pennsylvania (situate in the County of Allegheny) by separate or solitary confinement at labor, for and during the period of one year, to be computed from this date, there to be kept, fed clothed and treated as the law directs, and stand committed until the sentence be complied with."

BY THE COURT.

(Signed) PAUL A. BENSON,
JOHN B. BROOKS,
CHARLES H. ENGLISH,
Attorneys for Appellants.

Endorsement: No. 319, January Term, 1909—Commonwealth vs. Charles A. Ensign—Assignments of Error—Filed Apr. 18, 1910—in Supreme Court.

* * * * * * *

235–240 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1909.

Filed May 24, 1910.

Nos. 318 & 319.

COMMONWEALTH
vs.
WILLIAM A. ENSIGN and CHARLES A. ENSIGN.

Appeal from the Superior Court Q. S. Erie Co.

Per Curiam:

The judgments are affirmed on the opinion of the learned President Judge of the Superior Court.

* * * * * * *

241–254 STATE OF PENNSYLVANIA,
Eastern District, ss:

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do hereby certify that the above and foregoing is a true copy of the Record in the above case so full and entire as filed of record in said Court.

In testimony whereof I have hereunto set my hand, and affixed the seal of said Court at Philadelphia this 17th day of August, A. D. 1910.

[Seal of the Supreme Court of Pennnsylvania. 1776. Virtue, Liberty & Independence.]

ALFRED B. ALLEN,
Deputy Prothonotary.

* * * * * * *

255 In the Supreme Court of the United States.

WILLIAM A. ENSIGN, CHARLES A. ENSIGN, Plaintiffs in Error,
vs.
COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

Stipulation as to Printing Record.

It is stipulated and agreed by and between John B. Brooks and S. A. Davenport, counsel for plaintiffs in error, and W. Pitt Gifford and U. P. Rossiter, counsel for defendant in error, that in order to save expense in the printing of the record herein, that the following

portions of the record, and the same being sufficient to show the error complained of, shall be printed and no more, to wit:

256 It is further stipulated and agreed that if from oversight or omission that any necessary part of the record be not thus printed that the plaintiffs in error have the right to print or may be required by the defendant in error to print any further or additional portions thereof.

JOHN B. BROOKS,
S. A. DAVENPORT,
Att'ys for Pl'ffs in Error.
W. PITT GIFFORD,
U. P. ROSSITER,
Att'ys for Def't in Error.

257 [Endorsed:] Supreme Court of the U. S. William A. Ensign, Charles A. Ensign, Plaintiffs in Error, vs. Commonwealth of Penna., Defendant in Error. Stipulation as to Printing Record. Benson, Brooks & English, Attorneys-at-Law, Erie, Pa.

258 [Endorsed:] File Nos. 21298, 21299. Supreme Court U. S., October Term, 1910. Term Nos. 677 & 678. Wm. A. Ensign, P. E., vs. The Commonwealth of Pennsylvania and Charles A. Ensign, P. E., vs. The Commonwealth of Pennsylvania. Stipulation as to printing record. Filed Jan'y 6th, 1911.

Endorsed on cover: File No. 22,298. Pennsylvania Supreme Court. Term No. 123. William A. Ensign, plaintiff in error, vs. The Commonwealth of Pennsylvania. File No. 22,299. Term No. 124. Charles A. Ensign, plaintiff in error, vs. The Commonwealth of Pennsylvania. Filed August 22d, 1910. File Nos. 22,298 and 22,299.

FILED.

DEC 26 1912

JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 123.

WILLIAM A. ENSIGN,
Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

No. 124.

CHARLES A. ENSIGN,
Plaintiff in Error.

vs.

THE COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Brief for Plaintiff in Error.

JOHN B. BROOKS,
CHARLES H. ENGLISH,
Attorneys for Plaintiff.

ERIE PTG. & BND. CO., ERIE, PA.

INDEX.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1912.

No. 123.

WILLIAM A. ENSIGN, Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA
Defendant in Error.

No. 124.

CHARLES A. ENSIGN, Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE
STATE OF PENNSYLVANIA.

INDEX.

STATEMENT OF THE CASE.

The defendants, William A. Ensign and Charles A Ensign, were private bankers in the Boro of North East, Pennsylvania, for a long time prior to February 12, 1908.

Wm. A. Ensign was at that time about eighty years old and had been engaged in the banking business in North East for a great many years. The other defendant, Charles A. Ensign, his son, was associated with him, but devoted most of his time and attention to an Insurance Business which he conducted in the same building with the bank. The business of the bank was conducted by Wm. A. Ensign and a clerk with the assistance occasionally of Charles A. Ensign.

On the 15th day of February, 1908, the defendants, Wm. A. Ensign and Son, closed their banking house and immediately thereafter, on the 17th day of February, 1908, made an assignment for the benefit of their creditors to L. E. Cushman. The partnership of Wm. A. Ensign and Son was thrown into involuntary bankruptcy on petition of their creditors, and schedules were filed by the defendants as provided by the bankruptcy law in the case of involuntary proceedings.

Sometime after the schedules were filed, on June 2, 1908, an information against the two defendants was made before a Justice of the Peace in the Boro of North East, and after hearing they were bound over to the Quarter Sessions Court of Erie County. On November 10th, 1908, a true bill on the charge of embezzlement as bankers under the Act of May 9, 1889, P. L. 145 (see appendix for copy) was found against both defendants. A jury was sworn and the case tried on November 19th, 1908, which resulted in a verdict of

guilty as indicted. The prosecutor in this case was Isaac Ackerman, who had on February 12, 1908, deposited in the bank of the defendants the sum of $1,000, which sum was still on deposit on February 17th, at the time of making the assignment.

The evidence upon which the information was made, the indictment found and the verdict rendered came principally from the schedules in bankruptcy filed by the defendants and from the books turned over to the trustee.

THE QUESTIONS INVOLVED ARE.

1. Whether on a trial in a State Court for receiving money by an insolvent banker it is a violation of his constitutional rights to admit as evidence against him

(a) Schedules filed by him in involuntary bankruptcy.

(b) Statements made from his private banking books that had been turned over to the Trustee in Bankruptcy.

2. The construction of Section 7 of the United States Bankrupt Law—does the last two lines of clause nine include schedules and the books turned over to the Trustee?

These questions were raised on the trial of the case below when the Commonwealth offered the schedules and statements made from the private banking books of the defendant, as evidence against him in a criminal trial, and the same were objected to by the defendants, but were admitted by the trial court over the objections made by the defendants' counsel, which offers and objections fully appear in the several assignments of error copied herein.

No. 123

ASSIGNMENTS OF ERROR.

Comes now the plaintiff in error in the above entitled cause, and avers and shows that in the record and proceedings in said cause, the Supreme Court of the State of Pennsylvania erred to the grievous injury and wrong of the plaintiff herein, and to the prejudice, and against the rights of the plaintiff in error in the following particulars, to-wit:

First Assignment of Error:

The Supreme Court of the State of Pennsylvania erred in not deciding that the trial Court erred in admitting as evidence of the insolvency of the defendants at the time of receiving the deposit on February 12, 1908, the schedules in bankruptcy and signed by the defendant, involuntary bankrupt, on the 30th day of April, 1908.

There were three separate schedules:

The individual schedule of W. A. Ensign, which showed a total indebtedness of $4,038.39, and total assets of $1,930.00, as shown by the summary of debts and assets.

The individual schedule of Charles A. Ensign, which showed a total indebtedness of $669.45 and total assets of $1,205.37, as shown by summary of debts and assets.

The schedule of W. A. Ensign and Charles A. Ensign, partners, which showed a total indebtedness of $73,932.14, and total assets of $26,765.19, as shown by the summary of debts and assets.

"Commonwealth offers the Schedules in Bankruptcy in evidence accompanied by an offer to follow that evidence with proof that the same condition of insolvency disclosed in the schedules existed on the day that the deposit in question was received. Objected to the offer of any of the schedules in bankruptcy or to the offer of any evidence taken before the Referee in Bankruptcy, or any other matter that appears as evidence against the defendants that they were compelled to produce acting under the direction of the United States statute in regard to bankruptcy; on the ground that a man cannot be compelled to furnish evidence against himself." The Court: "That Act says that his testimony shall not be offered against him. In my opinion the schedules filed in this case are competent evidence. I don't know that this precise question has been decided by the court, heretofore. But I believe, on principle, and on authorities, so far as we have been able to examine the authorities in Pennsylvania, that in the State Court those schedules are competent evidence whatever the rule might be in the U. S. Court."

The rule in Pennsylvania has not been held quite as strict in excluding testimony obtained in other judicial investigations as it has in the United States Court. For example, in the proceedings in the State Court for violation of the election laws, a party may be compelled to testify. That has been decided by the Supreme Court in the case of Kelly's Appeal, 290 Penna, page 430. Also in the case of Commonwealth vs. John Gibbons, 9th Superior Court, page 527. 142 U. S., page 547 does not apply in proceedings in the State Courts, under a State statute.

Objected to further, that the bankrupt law provides that no testimony given by a party shall be offered in evidence against him in any criminal proceeding. That it is contrary to public policy and in contra-

vention of the constitutional rights of the defendant, and in violation of the statutes of the United States.

"Objections overruled and exception sealed for the defendants."

Emory A. Walling, P. J. [Seal]

(The schedules are received).

The Court: "I am not prepared to hold that schedules filed by a bankrupt, whether voluntary or involuntary, would be considered as 'testimony' within that provision.

Second Assignment of Error:

The Supreme Court of the State of Pennsylvania erred in not deciding that the trial Court erred in admitting in evidence statements and compilations made by an accountant from the private banking books of the defendants which had been turned over to the trustee in the involuntary bankruptcy proceedings and produced in Court by the trustee.

A. I. LOOP testified:

Q. You are trustee for W. A. Ensign and Charles A. Ensign, in bankruptcy?

A. Yes sir.

Q. In your capacity as trustee state whether or not you took possession of the books and papers of the bank?

A. Yes sir.

(Refers to books on table.)

Q. State whether they are books of the bank?

A. Yes sir.

MR. CHARLES P. RILEY being examined, testified:

Q. Now state whether you have made a comparison of the assets and liabilities schedules in the Bankruptcy Schedule in the Ensign case, with the books of the bank, on the 15th of February, 1908?

A. I have.

Q. What do you say as to whether or not the schedules are made up from the books, of the 15th of February, 1908?

Objected to.

Offered to show that it revealed the condition of the bank on the 15th of February; that there was no Liabilities or Assets acquired after that date.

Objected to.

Objection overruled, and exception sealed for the defendants.

Emory A. Walling, P. J. [Seal]

A. They are taken from the books of W. A. Ensign & Son at the close of business February 15th, and the schedules made up from them.

Q. Have you made an examination of the condition of the bank of W. A. Ensign & Son on the 12th of February, 1908?

A. I have.

Q. What do you find their condition to be on that day?

A. I find them to be insolvent on that day, to the extent of about fifty thousand dollars.

Objected to, and defendants' counsel asks that the answer be stricken out.

The Court:

Q. That is your conclusion from the examination of the books of the bank?

A. Yes sir.

On cross-examination by Mr. Brooks, he testified:

Q. When did you make this examination of the books?

A. A week ago; of the books.

Q. Where did you make it?

A. At the District Attorney's office.

Third Assignment of Error:

The Supreme Court of the State of Pennsylvania erred in not setting aside the Order of the trial court in refusing a new trial and arrest of judgment.

Order of Court: And now, January 4th, 1909, the rule for a new trial and in arrest of judgment in above stated case is discharged. Per curiam.

Fourth Assignment of Error:

The Supreme Court of the State of Pennsylvania erred in not setting aside the verdict of the jury which was as follows:

Verdict of Jury: Guilty as indicted.

Fifth Assignment of Error:

The Supreme Court of the State of Pennsylvania erred in not setting aside the judgment of the Court below which was as follows:

Judgment: The Court sentence the defendants to pay a fine of two thousand ($2,000.00) dollars each to the Commonwealth, pay the costs of the prosecution, and restore the property taken, if not already done, or to pay the value thereof to the owner thereof; and each to undergo an imprisonment in the Western Penitentiary of Pennsylvania, by separate and solitary confinement at labor for and during the period of one year, to be computed from this day, there to be kept, fed, clothed and treated as the law directs and to stand committed until the sentence be complied with.

By the Court.

WHEREFORE, for these and other manifest errors appearing in the record, the said William A. Ensign, Plaintiff in Error, prays that the judgment of the said Supreme Court of Pennsylvania be reversed and set aside, and held for naught and that judgment be rendered for plaintiff in error, granting him his rights under the Constitution of the United States, and of the State of Pennsylvania, and under the statutes and laws of the United States, and plaintiff in error also prays judgment for his costs.

JOHN B. BROOKS,
Attorney for Wm. A. Ensign,
Plaintiff in Error.

No. 124

ASSIGNMENTS OF ERROR.

Comes now the plaintiff in error in the above entitled cause, and avers and shows that in the record and proceedings in said cause, the Supreme Court of the State of Pennsylvania erred to the grievous injury and wrong of the plaintiff herein, and to the prejudice, and against the rights of the plaintiff in error in the following particulars, to-wit:

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There were three separate schedules:

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The individual schedule of Charles A. Ensign, which showed a total indebtedness of $669.45 and total assets of $1,205.37, as shown by summary of debts and assets.

The schedule of W. A. Ensign and Charles A. Ensign, partners, which showed a total indebtedness of $73,932.14, and total assets of $26,765.19, as shown by the summary of debts and assets.

"Commonwealth offers the Schedules in Bankruptcy in evidence accompanied by an offer to follow that evidence with proof that the same condition of insolvency disclosed in the schedules existed on the day that the deposit in question was received. Objected to the offer of any of the schedules in bankruptcy or to the offer of any evidence taken before the Referee in Bankruptcy, or any other matter that appears as evidence against the defendants that they were compelled to produce acting under the direction of the United States statute in regard to bankruptcy; on the ground that a man cannot be compelled to furnish evidence against himself." The Court: "That Act says that his testimony shall not be offered against him. In my opinion the schedules filed in this case are competent evidence. I don't know that this precise question has been decided by the court, heretofore. But I believe, on principle, and on authorities, so far as we have been able to examine the authorities in Pennsylvania, that in the State Court those schedules are competent evidence whatever the rule might be in the U. S. Court."

The rule in Pennsylvania has not been held quite as strict in excluding testimony obtained in other judicial investigations as it has in the United States Court. For example, in the proceedings in the State Court for violation of the election laws, a party may be compelled to testify. That has been decided by the Supreme Court in the case of Kelly's Appeal, 290 Penna, page 430. Also in the case of Commonwealth vs. John Gibbons, 9th Superior Court, page 527. 142 U. S., page 547 does not apply in proceedings in the State Courts, under a State statute.

Objected to further, that the bankrupt law provides that no testimony given by a party shall be offered in evidence against him in any criminal proceeding. That it is contrary to public policy and in contra-

vention of the constitutional rights of the defendant, and in violation of the statutes of the United States.

"Objections overruled and exception sealed for the defendants."

Emory A. Walling, P. J. [Seal]

(The schedules are received).

The Court: "I am not prepared to hold that schedules filed by a bankrupt, whether voluntary or involuntary, would be considered as 'testimony' within that provision.

Second Assignment of Error:

The Supreme Court of the State of Pennsylvania erred in not deciding that the trial Court erred in admitting in evidence statements and compilations made by an accountant from the private banking books of the defendants which had been turned over to the trustee in the involuntary bankruptcy proceedings and produced in Court by the trustee.

A. I. LOOP testified:

Q. You are trustee for W. A. Ensign and Charles A. Ensign, in bankruptcy?

A. Yes sir.

Q. In your capacity as trustee state whether or not you took possession of the books and papers of the bank?

A. Yes sir.

(Refers to books on table.)

Q. State whether they are books of the bank?

A. Yes sir.

MR. CHARLES P. RILEY being examined, testified:

Q. Now state whether you have made a comparison of the assets and liabilities schedules in the Bankruptcy Schedule in the Ensign case, with the books of the bank, on the 15th of February, 1908?

A. I have.

Q. What do you say as to whether or not the schedules are made up from the books, of the 15th of February, 1908?

Objected to.

Offered to show that it revealed the condition of the bank on the 15th of February; that there was no Liabilities or Assets acquired after that date.

Objected to.

Objection overruled, and exception sealed for the defendants.

Emory A. Walling, P. J. [Seal]

A. They are taken from the books of W. A. Ensign & Son at the close of business February 15th, and the schedules made up from them.

Q. Have you made an examination of the condition of the bank of W. A. Ensign & Son on the 12th of February, 1908?

A. I have.

Q. What do you find their condition to be on that day?

A. I find them to be insolvent on that day, to the extent of about fifty thousand dollars.

Objected to, and defendants' counsel asks that the answer be stricken out.

The Court:

Q. That is your conclusion from the examination of the books of the bank?

A. Yes sir.

On cross-examination by Mr. Brooks, he testified:

Q. When did you make this examination of the books?

A. A week ago; of the books.

Q. Where did you make it?

A. At the District Attorney's office.

Third Assignment of Error:

The Supreme Court of the State of Pennsylvania erred in not setting aside the Order of the trial court in refusing a new trial and arrest of judgment.

Order of Court: And now, January 4th, 1909, the rule for a new trial and in arrest of judgment in above stated case is discharged. Per curiam.

Fourth Assignment of Error:

The Supreme Court of the State of Pennsylvania erred in not setting aside the verdict of the jury which was as follows:

Verdict of Jury: Guilty as indicted.

Fifth Assignment of Error:

The Supreme Court of the State of Pennsylvania erred in not setting aside the judgment of the Court below which was as follows:

Judgment: The Court sentence the defendants to pay a fine of two thousand ($2,000.00) dollars each to the Commonwealth, pay the costs of the prosecution, and restore the property taken, if not already done, or to pay the value thereof to the owner thereof; and each to undergo an imprisonment in the Western Penitentiary of Pennsylvania, by separate and solitary confinement at labor for and during the period of one year, to be computed from this day, there to be kept, fed, clothed and treated as the law directs and to stand committed until the sentence be complied with.

By the Court.

WHEREFORE, for these and other manifest errors appearing in the record, the said Charles A. Ensign, Plaintiff in Error, prays that the judgment of the said Supreme Court of Pennsylvania be reversed and set aside, and held for naught and that judgment be rendered for plaintiff in error, granting him his rights under the Constitution of the United States, and of the State of Pennsylvania, and under the statutes and laws of the United States, and plaintiff in error also prays judgment for his costs.

JOHN B. BROOKS,
Attorney for Charles A. Ensign,
Plaintiff in Error.

ARGUMENT.

Wm. A. Ensign and Chas A. Ensign, the defendants, for a long time prior to February 15th, 1908, had been engaged in running a private bank in the Boro of North East, Pa.

On the 17th day of February, 1908, they made an assignment to L. E. Cushman for the benefit of their creditors, which assignment was recorded February 22, 1908, in the Recorder's Office of Erie County. On April 28th, 1908, the firm of Wm. A. Ensign & Son were adjudged bankrupts upon petition filed in the United States District Court on the 24th day of February, 1908. On May 2nd, 1908, schedules in bankruptcy were filed with Joseph M. Force, referee. Later on the 18th day of June, 1908, an information was made against W. A. Ensign and C. A. Ensign, following which information, they were, on November 10th, 1908, indicted in the Court of Quarter Sessions of Erie County for embezzlement as bankers under the act of May 9th, 1889, P. L. 145, for a copy of which Act see appendix.

On the trial of the case the Commonwealth offered in evidence the schedules in bankruptcy, and

A statement made by Charles P. Riley, an accountant, from the books of the bank, which had been turned over to the Trustee in Bankruptcy.

The admission of these schedules and the statements taken from these books are the basis of our First and Second Assignments of Error.

If a bankrupt obeys the Bankrupt Law, he will

file schedules and turn over his books and papers to the Trustee and obey all other lawful orders of the referee. If he does not do these things as directed by the United States Statute and Gerneral Orders made by the United States Supreme Court for the government of bankrupts, he can be declared in contempt of court and imprisoned, and it seems to us that when the United States Law compels an individual to file schedules and turn over his books and papers that the use of these schedules and these books against him in a criminal trial is a violation of his rights under the Constitution of the United States and the Constitution of the State of Pennsylvania.

Article 5 of the United States Constitution provides:

"Nor shall he be compelled in criminal cases to be a witness against himself."

Article 1, Section 9, of the Constitution of Pennsylvania, provides:

"He cannot be compelled to give evidence against himself."

The Bankrupt Act of 1898, compels the bankrupt to file schedules and to turn over his books and papers.

Section 7, provides as follows:

Sec. 7, Duties of Bankrupts:—a The bankrupt shall (1) attend the first meeting of his cerditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign count-

ries; (6) immediately inform his trustee of any attempt by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition, if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one for the referee, and one for the trustee; and (9) when present at the first meeting of his cerditors, and at such other times as the court shall order, submit to an examination of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Section 9, which reads as follows:

"PROTECTION AND DETENTION OF BANKRUPTS.—a A Bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a Court of Bankruptcy for contempt or disobedience of its lawful orders;" prescribes a means of punishment for one who disobeys the lawful orders of the Bankrupt Court and General Order Number Nine can leave no doubt that it was the intention that where an involuntary bankrupt refused to file schedules that he should be imprisoned if it was in

the interests of his creditors so to do. The order reads as follows:

IX.

Schedule in Involuntary Bankruptcy.

"In all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid."

General Order No. XII reads:

Duties of Referee.

1. The order referring a case to a referee shall name a day upon which the bankrupt shall be subject to the orders of the court in all matters relating to the bankruptcy.

In the matter of *Fellerman A. B Reports, Vol* 17, *page* 785, the bankrupt was held to be guilty of contempt for refusing and neglecting to file schedules as required by the Bankrupt Act and refusing to surrender books of account or to give any explanation for their disappearance. In this case the bankrupts were committed to jail for a space of two months and fined a sum of $250.00 each.

The bankrupt must file schedules. It is compulsory (a) in order to obtain the benefits of the bankrupt law itself, (b) in involuntary proceedings the bankrupt

can be fined and imprisoned as of contempt, for failure to file schedules.

Jacobs vs. United States Circuit Court of Appeals, First Circuit, 161 Federal, page 694.

"The underlying philosophy of the statute in question is that, as a matter of justice to the bankrupt, and also for the interests of creditors, he should be encouraged to testify freely in his examination; but he would have no encouragement thereto if, on being prosecuted for an offense, he could not undertake to absolve himself by his own testimony, except at the risk of being tripped or embarrassed by what he had previously sworn to."

The bankrupt law was enacted by the Congress of the United States and the General Orders were made by the United States Supreme Court by authority of Congress.

Article 6, Constitution of the United States, provides:

"This Constitution and the Laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constutution or in the Laws of any state to the contrary thereof notwithstanding."

If a man has been declared an involuntary bankrupt he is not going to turn over books and papers to be used as evidence against him in a subsequent criminal prosecution and unless he does do these things the National Bankrupt Law will become a farce, and its most beneficient provisions will be made inoperative.

Remington, in his recent work on Bankruptcy,

section 2323, page 1412, says: "The schedules of a bankrupt may not be used by the Grand Jury; and an indictment procured by their use will be dismissed even though the crime charged is the false scheduling itself, whereby a false oath or concealment of assets was perpetrated."

United States vs. Marsh Chambers 13 A. B. R. 708:

"The use before the Grand Jury of the schedules of an involuntary bankrupt upon the consideration of which an indictment against him under Section 29, of the Bankrupt Act of fraudulent concealment of property was found, is an invasion of his constitutional rights and upon demurrer the indictment will be dismissed."

In the case of *Boyd vs. the U. S.* 116 *U. S.* 616, *on page* 752, we find language of the Court, which we think is applicable to this case: "Now it is elementary knowledge that one cardinal rule of the Court of Chancery is never to decree a discovery which might tend to convict a party of a crime, or to forfeit his property. Any compulsory discovery extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorent to the instincts of an Englishman, it is abhorent to the instincts of an American. It may suit the purpose of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

In addition to the fact that the schedules, books, etc., were inadmissible and in violation of the defendants' constitutional rights, we think they were also inadmissible under Section 7, clause 9 of the Bankrupt Act, which reads: "but no testimony given by him

shall be offered in evidence against him in any criminal proceedings."

From an examination of the entire Bankrupt Law, we are satisfied that it was the intention of Congress that such schedules and books should not be used against the one filing them in a subsequent criminal prosecution.

In the case *U. S. vs. Marsh Chambers A. B. R. Vol.* 13, 708, an indictment which was found by the use of the schedules of an involuntary bankrupt, before the Grand Jury, was not allowed to stand.

Johnson vs United States, 163 Federal Reporter, page 30, 89 C. C. A., 508:

"The schedules of a bankrupt are a representation that the property set forth is all the property known to the bankrupt, and hence, on an indictment against the bankrupt for concealing property from the trustee, cannot be admitted on the ground that they are offered not for the purpose of putting in evidence the statements contained in them, but only to show the fact that other statements are not contained in them."

Cohen vs. United States, ~~160~~ 170 Federal Reporter, page 715, 96 C. C. A., 35,

This was an appeal from the United States District Court for the District of South Carolina to the United States Circuit Court of Appeals, Fourth Circuit, and we herein copy the opinion in full.

"Goff, Circuit Judge:

The plaintiff in error was indicted for knowingly and fraudulently concealing certain personal property belonging to his estate as a bankrupt, which should have been returned and delivered to his trustee in bankruptcy. On trial duly had, he was convicted and

sentenced to imprisonment for the term of six months. The assignments of error relate to the admission during the trial of certain evidence offered by the district attorney for the consideration of the jury.

Over the objection of the plaintiff in error, the court below permitted the defendant in error to offer in evidence the schedules attached to the voluntary petition which had been filed by him in bankruptcy. These schedules were objected to on the insistence that under the bankrupt law no testimony of the bankrupt is admissable against him in a criminal proceeding, and that as the schedules constituted such testimony given by him, they came within the exemption of said law; and on the further ground that they constituted evidence obtained from the plaintiff in error by means of a judicial proceeding and that therefore by virtue of Section 860 of the Revised Statutes of the United States, were inadmissable.

The Bankruptcy Act requires the bankrupt to submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and all other matters which may affect the administration and settlement of his estate; but provides that no testimony given by him shall be offered in evidence against him in any criminal proceeding. It requires him to prepare, make oath to, and file with his petition a schedule of his property, showing the amount and kind thereof.

It was necessary for the defendant in error, in order to prove the allegations of the indictment, to show that certain property mentioned in the indictment was at one time in the possession of and owned by the plaintiff in error, and that thereafter it was by him concealed from his trustee. For the purpose of doing this, the Schedules in Bankruptcy were intro-

duced. The Bankruptcy Act, recognizing the well established rule that admissions of a party obtained by force, threats or duress, or by judicial proceedings, should not be used against him, provided that the testimony given by him in the proceedings connected with his bankruptcy should not be used as evidence in any criminal case against him. No one can be compelled to testify against himself; the immunity referred to is in accordance with the provisions of the Fifth Amendment to the Constitution of the United States, and with it should have a liberal construction. By that amendment, all citizens of the United States are given immunity from self-incrimination, and dependent of the legislation mentioned, this constitutional provision makes it contrary to the principles of our government to convict any one of crime by compelling the production of his private books and papers, or by resorting to the use of discoveries founded on his oath, required of him in judicial proceedings. Whatever the rule may be in the criminal courts of the States of the Union, concerning which it may be conceded there is conflict, certainly it must be admitted that in the Federal Courts the exemption from compulsory self-incrimination is secured by the Constitution of the United States. The language used in Section 7, subdivision 9, of the Bankruptcy Act of 1898—'but no testimony given by him shall be offered in evidence against him in any criminal proceeding''—is simply the recognition of the fact that the law requires the bankrupt to give his testimony in the proceedings by which he petitions for his discharge, and having thus forced him to testify, or to forego the benefits of the law, it proceeds to provide the immunity usual under such circumstances. The words we have quoted are not to be held as modifying or rendering inapplicable the provisions of said Section 860, to cases of this character. Rather are they in aid of that section, and even if the contention of the district attorney that the immunity granted in the Bankruptcy Act was

only intended to apply to the oral testimony of the bankrupt could be sustained, nevertheless said Section 860 would prevent the use of the bankrupt's schedules in a criminal prosecution.

This question was in substance considered and decided in the Circuit Court of Appeal, First Circuit in Johnson v. United States, 20 Am. B. R. 724, 163 Fed. 30, Mr. Justice Holmes speaking for the court and holding that the schedules in bankruptcy are protected by Rev. Stats., Section 860, and that it was error to admit them in evidence in a criminal prosecution.

In the case we now consider, the schedules were used by the prosecution for the purpose of showing that the property described in them was returned by the accused as all of the property owned by him at the time of the filing of his petition in bankruptcy, thereby tending to show in connection with other testimony offered to prove his ownership of other property, an intent on his part to aid in the concealment charged in the indictment. Such evidence was not only within the prohibition of the provisions of the Bankruptcy Act, but was contrary to the exemption afforded by the Revised Statutes quoted, which is even more comprehensive than the constitutional guarantee we have referrred to.

The schedules should not have been considered by the jury, and while it is not for us to determinate as to their force and effect relative to the different counts of the indictment, still we can properly say, that in the light of the other evidence found in the record the jury must have been greatly impressed by the information they furnished.

It becomes unnecessary to consider the other assign ments of error.

The judgment complained of will be reversed, the

verdict of the jury will be set aside, and the cause remanded for such further proceedings as may be proper

Reversed."

Archie Burrell vs. State of Montana, ~~189~~ 194, U. S., page ~~1122~~. 572.

"Plaintiff in error testified in his own behalf, and during the cross-examination he was questioned in regard to statements made by him in testimony made before the referee in bankruptcy in his own proceedings. No objection was made."

"In the case at bar, the court dealt with testimony which had been admitted without question or objection. We are brought, therefore, to the broad and ultimate contention of the plaintiff. We think it is untenable. There is no ambiguity in Section 7 of the bankrupt act. It requires a bankrupt to submit to an examination concerning his property and affairs, and provides: 'But no testimony given by him shall be offered in evidence against him in any criminal proceeding.' It does not say that he shall be exempt from prosecution, but only, in case of prosecution, his testimony cannot be used against him."

After reading the opinion in that case, one is led to believe that had the offer of the evidence been objected to by Burrell on the trial, that the Supreme Court would have held this admission to be error.

In the case at bar, objection was made to the admission of the incriminating evidence and admitted by the trial court over the objection of the defendants, as clearly appears in the assignments of error herein.

Had this prosecution or a similar prosecution been instituted in a Federal Court, the evidence objected to would have been clearly inadmissable and it does not seem to us to be reasonable that the privilege

allowed a bankrupt, growing out of the proceeding in a Fedral Court, should be denied to him because a prosecution has been instituted against him in the State Court, subsequent to the proceeding in the Federal Court, where he furnished the evidence concerning which he claims the privilege.

JOHN B. BROOKS,
CHARLES H. ENGLISH
Attorneys for Plaintiff in Error.

APPENDIX.

No. 162.

Act of May 9, 1889, P. L. 145.

Relating to the receiving of deposits by insolvent bankers, brokers or an officer of a bank, national state or private, defining, the offense, and providing a punishment therefor.

Section 1. Be it enacted, etc., That any banker, broker or officer of any trust or savings institution, national, state or private bank, who shall take and receive money from a depositor with the knowledge that he, they or the bank is at the time insolvent, shall be guilty of embezzlement, and shall be punished by a fine in double the amount so received, and imprisoned from one to three years in the penitentiary.

APPROVED—the 9th day of May, A. D. 1889.

JAMES A. BEAVER.

Supreme Court of the United States

OCTOBER TERM, 1912.

Office Supreme Court, U.
FILED.
JAN 17 1913
JAMES H. McKENN
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No. 123.

William A. Ensign, Plaintiff in Error,

vs.

The Commonwealth of Pennsylvania.

No. 124.

Charles A. Ensign, Plaintiff in Error,

vs.

The Commonwealth of Pennsylvania.

Brief for the Commonwealth of Pennsylvania,

Defendant in Error.

W. PITT GIFFORD,
J. ORIN WAIT,
U. P. ROSSITER,
Attorneys for Defendant in Error.

[illegible] PTG. & BIND. CO. ERIE, PA.

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 123.

WILLIAM A. ENSIGN, Plaintiff in Error

vs.

THE COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

No. 124.

CHARLES A. ENSIGN, Plaintiff in Error

vs.

THE COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

In Error to the Supreme Court of the State of Pennsylvania.

BRIEF FOR THE DEFENDANT IN ERROR.

QUESTIONS INVOLVED.

Whether upon the trial of an indictment drawn under the Act of the General Assembly of Pennsylvania of May 9th, 1889, P. L. 145, charging the receiving of deposits by an insolvent banker with knowledge that he is at the time insolvent, schedules filed by the defendant in involuntary bankruptcy, and testimony of an expert accountant based upon an examination of his banking books which he had turned over to the trustee in bankruptcy, are admissable against him.

ARGUMENT.

It is contended by the plaintiffs in error:

FIRST. That the use of their schedules in bankruptcy and their books of account was in violation of their rights under the provision of the Federal Constitution, that no person "shall be compelled in any criminal case to be a witness against himself;" the compulsion alleged being that the schedules were filed and the books were delivered to the trustee in obedience to the provisions of the bankruptcy law and of the general orders in bankruptcy.

SECOND. That the proviso immediately following Clause 9 of Section 7 of the Federal Bankruptcy Act of 1898, relating to the examination of the bankrupt, which proviso is in the following language: "But no testimony given by him shall be offered in evidence against him in any criminal proceeding," prevents the admission as evidence against the bankrupt in a criminal proceeding, of schedules filed and books turned over to the trustee.

It is submitted, on behalf of the defendant in error, that both of these positions are untenable. As to the first, it is to be observed: (1) that the bankruptcy act attaches no penalty to the bankrupt's failure to file the schedules; (2) that the schedules involved in this case were not filed under compulsion of any special decree or order of court, or of any attachment or proceeding for attachment; (3) that the defendants did not object to filing them upon the ground that thereby they would furnish evidence that might incriminate them; (4) they did not file them under the inducement of any provision of any act of Congress, or of the state legislature, prohibiting them from being used against them in any criminal prosecution in the state courts; (5) that at the time they filed the schedules and delivered the books, they were not under arrest, had not been charged with any criminal offense, and were not under any sort of duress.

Generally speaking, and in the absence of statutory regulation on the subject, testimony and written statements, voluntarily given or made by a party or witness in a judicial proceeding, are, as admissions and confessions, competent against him on the trial of any issue in a criminal case to which they are pertinent; and statements made by a party in a judicial inquiry are considered voluntary, if he might have objected to answering on the ground that it would incriminate him, and failed to do so.

Wharton's Criminal Evidence, section 664.

Roscoe Criminal Evidence, vol. 1, p. 82, 245 (8th ed.)

Greenleaf on Evidence, vol 1, section 225.

Williams vs. Commonwealth, 29 Pa., 102.

Hendrickson vs. People, 10 N. Y., 13.

Commonwealth vs. Reynolds, 122 Mass. 454.

Vermont vs. Duncan, 4 L. R. A., (N. S.) 1144 note.

People vs. Wieger, 100 California, 352.

People vs. Arnold, 40 Michigan, 710.

Abbott vs. People, 75 N. Y., 602.

Commonwealth vs. Doughty, 139 Pa. 383.

Commonwealth vs. House, 6 Penna, Superior, 92.

Burrell vs. Montana, 194 U. S. 572.

A written statement of the defendant, when prepared deliberately and seriously, is not only admissible in evidence against him, but is of weight proportioned to its pertinency.

Wharton's Criminal Evidence, sec. 643 (8th ed.)

Greenleaf on Evidence, vol. 1, sec. 215 (Lewis's ed.)

That bankrupts situated as these plaintiffs in error were, might have refused to answer, on the ground of self-incrimination, has been expressly ruled. In the case of **Counselman vs. Hitchcock, 142 U. S., 547,** in construing a clause of the Inter-State Commerce Act which was in the following language, very similar to section 7a, clause 9, of the bankruptcy act:

"But such evidence of testimony shall not be used against such person on the trail of any criminal proceeding." Held, that such provision did not grant immunity from prosecution, and hence did not take away the privilege of the witness to refuse to answer questions which might incriminate him. Following this ruling of the United States Supreme Court, a Federal court, in **Re Nachman, 8 American Bankruptcy Reports, 180,** held that the bankrupt when under examination before a Referee in Bankruptcy, could not be compelled to answer a question, the answer to which he claims would tend to incriminate him. Similar rulings are to be found in

In Re Feldstein, 4 Am. Bankr. Rept., 32.

In Re Welsh, 4 Am. Bankr. Reps., 693.

In Re Henschell, 7 Am. Bankr. Reps., 207.

In Re Shera, 7 Am. Bankr. Reps., 552.

In Re Smith, 7 Am. Bankr. Reps., 213.

In Re Kanter, 9 Am. Bankr. Reps., 104, 117 Fed. 356

U. S. vs. Goldstein, 12 Am. Bankr. Reps., 755 132 Fed. 789.

and this may now be said to be the settled rule of the Federal Bankruptcy Courts.

No distinction is to be found, in principle, between refusing to answer questions or give testimony as required by section 7a of the Bankruptcy Act, on the ground of self-incrimination, and refusing to file schedules or turn over books of accounts as re-

quired by the same section of the Bankruptcy Act, on the ground of incrimination. The terms "voluntary" and "involuntary," as used in the Bankruptcy Act, have no significance as regards the compulsion of the bankrupt to file schedules of his assets and liabilities. The only difference in this respect between a voluntary and an involuntary bankrupt is in the length of time given him to file his schedules, and in neither case is there any penalty attached by the Bankruptcy Act to his failure to file a schedule.

The defendants might have objected to answering the questions before the Referee in Bankruptcy, on the ground that it would incriminate them, but they did not. They might have refused to file schedules, upon the ground that information therein contained might be used against them, precisely as it has been used in this case, but they did not. They might refuse to give up the custody of their books, on the ground that as bankers they were liable to prosecution under the Pennsylvania Act of 1889, P. L., 145, and that the books might incriminate them.

In Re Hess, 14 Am. Bankr. Rep., 559; 134 Fed., 109.

While upon an application to compel a bankrupt to produce his books and deliver them to his trustee, the plea of constitutional privilege must prevail, yet he should be required to bring the books and papers which he alleges contained incriminating evidence before either the court or the referee in bankruptcy, and if it appears that his plea is well founded, the Court can make such order as will fully protect him from discovery of such evidence, and if possible enable the trustee to obtain such information as is necessary and indispensable in the settlement of the estate.

See also, **In Re Hark, 14 Am. Bankr., Rep., 624; 136 Federal, 986.**

In Re Harris, 20 Am. Bankr. Rep., 911; 164 Fed., 292.

But they offered no such objection; clearly, therefore, their

acts in filing their schedules and delivering the books of account were voluntary; they could not thereafter set up the protection of the Constitution, either Federal or State, which they had so unequivocally waived.

Tucker against the United States, 151 United States, 164:

If freely given once, the evidence may of course be used thereafter, for the privilege is purely personal and may be waived.

See also **Tracy & Co., 23 Am. Bankr. Rep., 438.**

There is no question of duress here. These documents used in evidence against the plaintiffs in error were not obtained by the Commonwealth as the result of any coercion or compulsion exerted by it upon the defendants. At the time they filed their schedules and delivered their books of account, they were neither under arrest, nor charged with a criminal offense, nor under any sort of duress. But it is contended that they were under a sort of compulsion on account of the general orders in bankruptcy, which might render them liable for contempt on failure to obey the orders of the bankruptcy court. It should be observed, in this connection, however, that the schedules were not filed under compulsion of any decree or order of court, or any attachment or proceedings for attachment, and that no proceedings of any sort had been instituted to compel the defendants to file schedules or deliver their books of account. Furthermore, the fallacy of this argument lies in the fact that no contempt proceeding can render ineffective the provisions of the Constitution. The matter of **Fellerman, 17 Am. Bankr. Reps. 785,** cited in paper-book for the plaintiffs in error, page 19, was a case of wanton, willful, and deliberate disregard of the orders of the bankruptcy court, and no question of constitutional privilege was in any way involved. No case has been cited nor can any be found, we believe, which deprives a citizen of his right to refuse to answer on the ground of self-incrimination, by commit-

ment or fine for contempt. It would be inconceivable if what the Constitution guarantees, a judge could take away by a contempt proceeding. It has been expressly ruled, in **Glassner, Snyder & Co., 8 Am. Bankr. Reps., 184,** that the defendant was entitled to the protection of the privilege, against self-incrimination, against an order to deliver up to the trustee in bankruptcy certain books and documents which he claimed might disclose evidence tending to incriminate him. That a bankrupt cannot be punished for contempt for refusal to answer criminating questions which related to the disposal of property which it was claimed he had concealed in fraud of creditors, was also held by the Federal Court in the matter of **George P. Rosser, 2 Am. Bankr. Reps., 746.**

In Re Kanter, 117 Federal Rep., 356 (Sourthern District of N. Y.)

The District Court denied motions on the part of the petitioning creditors and the receiver in bankruptcy to punish the bankrupts for contempt in failing to obey the usual order of the court requiring them to file schedules and turn over to the receiver their books of account, records, papers, etc., the bankrupts objecting on the plea that the schedules, books, etc., might tend to incriminate them, and that the order asked for would be an invasion of their rights under the fifth article of the Constitution of the United States and the Constitution of the State of New York.

In other words, the interposition of the plea of privilege against self-incrimination, if properly gounded, would render any contempt proceeding under the general orders in bankruptcy, ineffective.

It seems entirely clear, therefore, that no requirement of the Bankruptcy Act itself, which provides no penalty for failure to file schedules or deliver books of account, nor any provisions of the general orders in bankruptcy, to which reference is made in the paper-book of the plaintiffs in error, page 19, in any way prevented the defendants from refusing to file their schedules

or deliver up their books of account, had they taken advantage of the constitutional privilege that to do so might incriminate them.

The fatal weakness of the position of the plaintiffs in error is, that they filed their schedules in bankruptcy, and turned over their books of account to their trustee in bankruptcy, when they might have objected on the ground that this would incriminate them. This they failed to do. In the face of all the authorities, this rendered their statements thus made, voluntary. They now seek to shield themselves under the constitutional provision which they long ago waived. The time for them to have invoked the protection of the privilege against self-incrimination was when they were asked to file their schedules and deliver their books, and not when those schedules, voluntarily filed, and those books volunatrily delivered, were sought to be used by the Commonwealth of Pennsylvania as bearing upon an issue in a criminal case to which the said schedules were highly pertinent.

The time to claim the privilege is when the testimony is offered or book or document is about to be inspected, and if not then claimed, it is waived.

Remington on Bankruptcy, Sec. 1561.

Tracy & Co. 23 Am. Bankr. Rep. 438.

Burrell vs. Montana, 194 U. S., 572.

A witness who voluntarily testifies cannot resist the effect of the testimony by claiming that he could not have been compelled to give it. The time to avail of a statutory or constitutional protection is when the testimony is offered. The use of statements contained in these schedules, regarding their financial condition, thus voluntarily obtained, is no more of an invasion of their rights than the production of letters which they might have written, or conversations which they had, or testimony which they might have given in a civil suit prior to the criminal

prosecution concerning their financial condtion. To exclude one would be as reasonable as to exclude the others.

Kerrch Bros. vs. United States, 171 Federal, 366.

On the trial of an involuntary bankrupt for conspiracy to conceal property from his trustee, it is not error to admit in evidence, over defendant's objection and claim of privilege, his books of account, which had been taken possession of by a receiver appointed by the bankruptcy court.

United States against Halstead, 27 Am. Bankr., Rep., 302. (Court of Appeals, District of Columbia).

The use before a grand jury of books, papers, and records of a bankrupt which had been taken charge of by a receiver in bankruptcy pursuant to an order of the bankruptcy court, and which contain the record and accounts with respect to the matters charged in an indictment against the bankrupt, is no violation of the fifth amendment to the United States Constitution, providing that no person shall be compelled in any criminal case to be a witness against himself.

Matter of Tracy & Co., 23 Am. Bankr. Rep., 438. (United States District Court for the Southern District of New York.)

Where a bankrupt, without protest or claim of constitutional privilege, surrenders his books of account to the Receiver in Bankruptcy, he waives any privilege against self-incrimination under the Federal Constitution, so far as his books are concerned, and the Trustee in bankruptcy may properly permit a state prosecuting officer to make use of the bankrupt's books of account which he had voluntarily surrendered to the receiver, in a criminal prosecution against the bankrupt.

Strait vs. State, 84 Minnesota, 384; 102 Northwestern, 913; 13 Am. Bankr. Rep., 708, note.

In a criminal prosecution against a private banker for receiving deposits when his bank was insolvent, where such banker has made an assignment in bankruptcy and his books have been turned over to the trustee; held that such trustee, with the books, might be examined before the grand jury, upon an investigation of the affairs of the bank, and that such examination did not involve any unlawful use of his private papers in violation of his constitutional rights.

"The objection to be of potential force must directly involve the action of a court in using compulsory means to obtain evidence which deprives the accused of the protection which is personal to him and his private papers directly involved." (Such was the case of Boyd against the United States, 116 United States, 616).

"It cannot upon reasonable grounds be justly claimed that courts will institute an inquisition upon the means by which documentary testimony is obtained, even although evidence may have been illegally taken from the possession of the party against whom they are offered or otherwise unlawfully obtained. This is no valid objection to their admissiblilty, if they are pertinent to the issue."

In the matter of **Harris, 221 United States, 274,** the District Court made an order that the bankrupt should deposit his books of account in the office of the receiver, there to remain in the custody of the bankrupt, the latter to afford the receiver every opportunity to inspect the same, but the receiver to use and permit them to be used, only for the purpose of the civil administration of the estate, and not for any criminal proceedings. It was ordered further that in case of subpoena or other process to the receiver for their production, he would notify the bankrupt, to the end that the bankrupt might have an opportunity to raise the question of constitutional privilege. The bankrupt petitioned the Circuit Court of Appeals to revise the order, excepting to it on the ground that no statute protected him from knowledge gained from the books being used to find and get evidence that might be used against him in a criminal prosecution. He relied

upon the fifth admendment to the Constitution and the case of Counselman against Hitchcock, 142 U. S., 547. The Circuit Court of Appeals certified the question whether the order was a proper exercise of the authority of the bankruptcy court, to the United States Supreme Court, and in an opinion answering the inquiry in the affirmative, Mr. Justice Holmes says, inter alia:

"If the order to the bankrupt, standing alone, infringed his constitutional rights, it might be true that the provision intended to save them would be inadequate, and that nothing short of statutory immunity would suffice; but no constitutional rights are touched. The question is not of testimony, but of surrender; not of compelling the bankrupt to be a witness against himself in a criminal case, present or future, but of compelling him to yield possession of property which he is no longer entitled to keep. If a trustee had been appointed, the title to the books would have passed into him by the express terms of section 70, and the bankrupt could not have withheld possession of what he no longer owned, on the ground that otherwise he might be punished. That is one of the misfortunes of bankruptcy, that it follows crime. The right not to be compelled to be a witness against one's self is not a right to appropriate property that may tell one's story."

In the case of **Adams vs. New York, 192 United States, 585,** the officers had seized, under a serach warrant, certain "policy slips," claimed to have been used by the defendant in violation of the law. They also seized at the same time certain private papers; though not included in the warrant for search and seizure, these private papers became important evidence, as tending to show the custody of the policy slips with knowledge. They were admitted in evidence, over objection of the defendant, in proving his guilt. The competency of the evidence was sustained by the United States Supreme Court on appeal, it being held that there was no violation of the constitutional guaranty of privilege from unlawful search or seizure in the admission of the private papers, and that the accused was not compelled to incriminate himself. It was further suggested in the course of

the opinion, page 598, that the fourth and fifth amendments to the Federal Constitution were designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen, or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect.

The opinion of the Federal Court, in **Re Nachman, 8 Am. Bankr. Reps., 180,** is a complete answer to planitiff in error's contention that by the exercise of the constitutional right against self-incrimination by bankrupts, "the national bankrupt law will become a farce, and its most beneficent provisions will be made inoperative." (See paper-book of plaintiffs in error, page 20). The language of the Court is as follows:

"It may be contended that the object desired to be accomplished by section 7 of the bankruptcy act, which requires the bankrupt to submit to an examination concerning the conduct of his business, will be defeated if the witness is thus permitted to refuse to testify concerning his dealings with his creditors and others, and such undoubtedly is the unfortunate result; but it is for Congress to provide, if it can, against such contingencies."

It may also be said that there are comparatively few cases where the schedules would furnish evidence of crime. Moreover, rule 9 of the general orders in bankruptcy expressly provides that the creditors may file the schedules and proceed with the administration of the bankrupt's estate. Failure or refusal of the bankrupt to file schedules cannot therefore thwart the operation of or render ineffective the Bankruptcy Act.

The cases cited by appellants from various federal courts, as authority for refusal to admit schedules in bankruptcy in a criminal prosecution, have no application here, being founded upon section 860 of the Revised Statutes, and not upon the provisions of the Bankruptcy Act. See **Johnson vs. United States, 20 Am. Bankr. Reps., 724; United States vs. Cham-**

bers, 13 Am. Bankr. Rep., 708, and note, the section of the Revised Statutes referred to provides as follows:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial prodeeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture; provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

It was upon this very explicit Act of Congress, applying only to the courts of the United States, and not upon any provisions of the Bankruptcy Act or general orders in bankruptcy or constitutional provisions, that the United States courts base their refusal to admit the schedules in bankruptcy in the cases referred to.

The case of the **United States vs. Cohen, 170 Federal Reporter, 715,** relied upon by the appellants, is another case based upon section 860 of the Revised Statutes, and upon careful analysis will be found to decide nothing further than that in the prosecution of a bankrupt for concealing property from his trustee, the schedules filed by him are not admissable in evidence against him, being within the provision of Revised Statutes, section 860, that no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding, shall be given in evidence in any criminal proceeding, and where referred to is cited as authority for such doctrine. (See **Collier on Bankruptcy, p. 245, 9th Ed.**)

The case of **Burrell against the State of Montana, 194 United States, 572,** is readily distinguishable from the case at bar. It is wholly concerned with oral testimony given by a bankrupt before a referee, under the provisions of section 7, subdivision 9 of the Bankruptcy Act. The plaintiff in error testified on his own behalf, and during the cross-examination he

was questioned in regard to statements made by him in testimony given before the referee in bankruptcy in his own proceeding. No objection was made. The case decides that the provision of the bankruptcy act referred to does not amount to exemption from prosecution, nor does it deprive evidence of its probative value after it has been admitted without objection in a criminal prosecution against the bankrupt in the state court.

Jacobs vs. United States, 161 Federal, 694 (Cited in paper-book of Plaintiffs in Error, page 20) is a case where the language of the court quoted in the paper-book refers wholly to the oral testimony given before a referee in bankruptcy under Section 7a (9) of the Bankrupt Law, and in which the prosecuting attorney on the trial of the bankrupt for a criminal offense used a copy of his examination before the referee in the cross-examination of the defendant who was a witness on his own behalf in the criminal proceeding, and the evidence was admitted over the objection of the defendant.

Boyd vs. United States, 116 United States, 616, was a case in which the Supreme Court declared the section of the Customs Revenue Law of 1874 authorizing the court on motion to require the defendant to produce in court his private books and papers or else allegations of the government to be taken as confessed to be unconstitutional and void in a suit for penalties or forfeitures. It will readily be noted that defendants in this case at all times preserved their constitutional rights by refusing to file incriminating statements.

As to the second contention of the plaintiffs in error, with reference to the construction of section 7 of the Bankruptcy Act of 1908, clause 8 of said section provides for the filing of schedules; clause 9 of the same section provides for the bankrupt's examination at the first creditors' meeting, or as the court may order. The proviso, "but no testimony given by him shall be offered in evidence against him in any criminal proceeding," is a part of clause 9, and clearly refers only to the bankrupt's examination,

the subject matter of clause 9, and has no reference whatever to the filing of schedules as provided for in the previous section. With reference to appellant's contention that the schedules and books of account are to be considered "testimony", under section 7a, clause 9 of the Bankruptcy Act, it may be suggested that the authorities confine testimony to oral evidence or define it as the statement made by a witness under oath or affirmation.

Bouvier's Law Dictionary.

28 Am. & Eng. Encycl. of Law.

The bankrupt is not a witness when filing his schedules, and no definition of the word "testimony" has been found which is broad enough to include the pleadings or other papers filed in the case previous to the trial or hearing.

Johnson against the United States, 20 Am. Bankr. Rep., 724, holds bankruptcy schedules to be pleadings, rather than testimony, as did the trial judge here, who compared the schedules to a statement of claim, a bill of particulars, or an affidavit of defense. Had Congress intended to include in said provision all information furnished by the bankrupt, it could easily have so stated, by providing that no testimony or information given by him shall be offered against him in evidence in any criminal proceeding.

In conclusion, we respectfully submit, that the rulings of the learned Judge of the court below were free from error and fair to the defendants. That a new trial was properly refused; that the Superior Court committed no error in overruling the defendants' assignments of error and affirming the judgment of the court below; and that the Supreme Court of Pennsylvania committed no error in overruling the defendants' assignments of error and affirming the judgments upon the opinion of the Superior Court of Pennsylvania. The guilt of the defendants

was abundantly proven; they were rightfully convicted; and the convictions should be sustained.

W. PITT GIFFORD,
J. ORIN WAIT, District Attorney
U. P. ROSSITER,
Attorneys for the Commonwealth of Pennsylvania,
Defendant in Error.

WILLIAM A. ENSIGN v. COMMONWEALTH OF PENNSYLVANIA.

CHARLES A. ENSIGN v. SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Nos. 123, 124. Argued January 20, 1913.—Decided February 24, 1913.

The Fifth Amendment is not obligatory upon the States or their judicial establishments, and regulates the procedure of Federal courts only. *Twining* v. *New Jersey*, 211 U. S. 78.

A violation of defendant's rights under a provision in the state constitution which is identical to one in the Federal Constitution which is only obligatory on the Federal courts, does not infringe a Federal right.

The word "testimony" more properly refers to oral evidence than to documentary, and it is reasonable that a distinction should be made between the two.

The prohibition in § 9 of the Bankruptcy Act of 1898 against offering testimony given by the bankrupt in accordance with the provisions of that section as evidence in any criminal proceeding applies only to the testimony and not to the schedules referred to therein.

Rev. Stat., § 860, prohibiting the use of a pleading of a party or discovery of evidence by judicial proceeding against him in a criminal proceeding, while in force, was limited by its own terms to proceedings in the Federal courts and does not apply to one in the state court.

Evidence showing the results of an expert examination of the bankrupt's books is not "testimony" within the meaning of § 9 of the Bankruptcy Act of 1898.

Quære, and not necessary to determine in this case, whether the prohibition in § 9 of the Bankruptcy Act against using testimony of the bankrupt is not limited to criminal proceedings in the Federal courts and does not apply to such proceedings in the state courts.

228 Pa. St. 400, affirmed.

THE facts, which involve the question whether schedules filed by the bankrupt are, under the Fifth Amendment to

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the Federal Constitution and the provisions of the Bankruptcy Act, admissible in a criminal trial of the bankrupt in the state court, are stated in the opinion.

Mr. John B. Brooke, with whom *Mr. Charles H. English* was on the brief, for plaintiff in error:

The statement made by the accountant, from the books of the bank, which had been turned over to the trustee in bankruptcy, was improperly admitted.

If a bankrupt obeys the Bankruptcy Law, he will file schedules and turn over his books and papers to the trustee and obey all other lawful orders of the referee. If he does not do these things as directed by the United States statute and general orders made by the United States Supreme Court for the government of bankrupts, he can be declared in contempt of court and imprisoned, and when the United States law compels an individual to file schedules and turn over his books and papers, the use of these schedules and these books against him in a criminal trial is a violation of his rights under the Constitution of the United States and the constitution of the State of Pennsylvania. Amendment V of the United States Constitution; *Matter of Fellerman*, 17 Am. Bankr. Reps. 785; *Jacobs* v. *United States Circuit Court of Appeals, First Circuit*, 161 Fed. Rep. 694; *United States* v. *Marsh Chambers*, 13 Am. Bankr. Reps. 708; *Boyd* v. *United States*, 116 U. S. 616, 752; *Johnson* v. *United States*, 163 Fed. Rep. 30; *Cohen* v. *United States*, 170 Fed. Rep. 715; *Burrell* v. *State of Montana*, 194 U. S. 572.

Mr. W. Pitt Gifford, with whom *Mr. J. Orin Wait* and *Mr. U. P. Rossiter* were on the brief, for defendant in error:

Generally speaking, and in the absence of statutory regulation on the subject, testimony and written statements, voluntarily given or made by a party or witness in

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a judicial proceeding, are, as admissions and confessions, competent against him on the trial of any issue in a criminal case to which they are pertinent; and statements made by a party in a judicial inquiry are considered voluntary, if he might have objected to answering on the ground that it would incriminate him, and failed to do so. Wharton's Crim. Evidence, § 664; 1 Roscoe, Crim. Evidence, 8th ed., pp. 82, 245; 1 Greenleaf on Evidence § 225; *Williams* v. *Commonwealth*, 29 Pa. St. 102; *Hendrickson* v. *People*, 10 N. Y. 13; *Commonwealth* v. *Reynolds*, 122 Massachusetts, 454; *Vermont* v. *Duncan*, 4 L. R. A. (N. S.) 1144 n.; *People* v. *Wieger*, 100 California, 352; *People* v. *Arnold*, 40 Michigan, 710; *Abbott* v. *People*, 75 N. Y. 602; *Commonwealth* v. *Doughty*, 139 Pa. St. 383; *Commonwealth* v. *House*, 6 Pa. Super. 92; *Burrell* v. *Montana*, 194 U. S. 572.

A written statement of the defendant, when prepared deliberately and seriously, is not only admissible in evidence against him, but is of weight proportioned to its pertinency. Wharton's Crim. Evidence, § 643, 8th ed.; 1 Greenleaf, § 215, Lewis's ed.

That bankrupts situated as these plaintiffs in error were, might have refused to answer, on the ground of self-incrimination, has been expressly ruled. *Counselman* v. *Hitchcock*, 142 U. S. 547; *Re Nachman*, 8 Am. Bankr. Reps. 180; *In re Feldstein*, 4 Am. Bankr. Reps. 32; *In re Welsh*, 4 Am. Bankr. Reps. 693; *In re Henschell*, 7 Am. Bankr. Reps. 207; *In re Shera*, 7 Am. Bankr. Reps. 552; *In re Smith*, 7 Am. Bankr. Reps. 213; *In re Kanter*, 117 Fed. Rep. 356; *United States* v. *Goldstein*, 132 Fed. Rep. 789.

No distinction is to be found, in principle, between refusing to answer questions or give testimony as required by § 7*a* of the Bankruptcy Act, on the ground of self-incrimination, and refusing to file schedules or turn over books of accounts as required by the same section of the Bankruptcy Act on the ground of incrimination.

While upon an application to compel a bankrupt to produce his books and deliver them to his trustee, the plea of constitutional privilege must prevail, yet he should be required to bring the books and papers which he alleges contained incriminating evidence before either the court or the referee in bankruptcy, and if it appears that his plea is well founded, the court can make such order as will fully protect him from discovery of such evidence, and if possible enable the trustee to obtain such information as is necessary and indispensable in the settlement of the estate. *In re Hess*, 134 Fed. Rep. 109; *In re Hark*, 136 Fed. Rep. 986; *In re Harris*, 164 Fed. Rep. 292.

Having offered no such objection, clearly, therefore, their acts in filing their schedules and delivering the books of account were voluntary; they could not thereafter set up the protection of the Constitution, either Federal or state, which they had so unequivocally waived. *Tucker* v. *United States*, 151 U. S. 164.

If freely given once, the evidence may of course be used thereafter, for the privilege is purely personal and may be waived. See also *Tracy & Co.*, 23 Am. Bankr. Reps. 438. *Matter of Fellerman*, 17 Am. Bankr. Reps. 785, which involved no question of constitutional privilege, distinguished. See also *Glassner, Snyder & Co.*, 8 Am. Bankr. Reps. 184; *George P. Rosser*, 2 Am. Bankr. Reps. 746; *In re Kanter*, 117 Fed. Rep. 356.

The time to claim the privilege is when the testimony is offered or book or document is about to be inspected, and if not then claimed, it is waived. Remington on Bankruptcy, § 1561; *Tracy & Co.*, 23 Am. Bankr. Reps. 438; *Burrell* v. *Montana*, 194 U. S. 572; *Kerrch Bros.* v. *United States*, 171 Fed. Rep. 366; *United States* v. *Halstead*, 27 Am. Bankr. Reps. 302; *Matter of Tracy & Co.*, 23 Am. Bankr. Rep. 438; *Strait* v. *State*, 84 Minnesota, 384; *In re Harris*, 221 U. S. 274; *Adams* v. *New York*, 192 U. S. 585; *Re Nachman*, 8 Am. Bankr. Reps. 180.

Johnson v. *United States*, 20 Am. Bankr. Reps. 724; *United States* v. *Chambers*, 13 Am. Bankr. Reps. 708; *United States* v. *Cohen*, 170 Fed. Rep. 715; *Burrell* v. *Montana*, 194 U. S. 572; *Jacobs* v. *United States*, 161 Fed. Rep. 694; *Boyd* v. *United States*, 116 U. S. 616, distinguished.

With reference to the construction of § 7 of the Bankruptcy Act of 1898, cl. 8 provides for the filing of schedules; cl. 9 for the bankrupt's examination at the first creditor's meeting, or as the court may order. The proviso, but no testimony given by him shall be offered in evidence against him in any criminal proceeding, is a part of cl. 9, and clearly refers only to the bankrupt's examination. The schedules and books of account are not to be considered "testimony," under § 7*a*, cl. 9. "Testimony" is confined to oral evidence or the statements made by a witness under oath. Bouvier's Law Dict.; 28 Am. & Eng. Encycl. of Law.

No definition of the word "testimony" is broad enough to include pleadings or other papers filed in the case previous to the trial or hearing. *Johnson* v. *United States*, 20 Am. Bankr. Reps. 724.

Had Congress intended to include in said provision all information furnished by the bankrupt, it could easily have so stated, by providing that no testimony or information given by him shall be offered against him in evidence in any criminal proceeding.

MR. JUSTICE PITNEY delivered the opinion of the court.

There are two writs of error, but a single record. The plaintiffs in error were jointly indicted in the Court of Quarter Sessions of Erie County, Pennsylvania, under an act of May 9, 1889 (P. L. 1889, Act 172, p. 145), "Relating to the receiving of deposits by insolvent bankers, etc., defining the offense, and providing a punishment there-

for." It appears that they were engaged together in business as private bankers in the Borough of North East, Pennsylvania, for a long time prior to February 12, 1908; that on that day they received from the prosecuting witness a deposit of one thousand dollars; that on the fifteenth of February they closed their banking house, and on the seventeenth made an assignment for the benefit of their creditors; that they were shortly thereafter thrown into involuntary bankruptcy, and schedules were filed by them in the bankruptcy proceeding. The receipt of the deposit of February twelfth was made the basis of the indictment.

Upon the trial the Commonwealth offered in evidence, and the court admitted, against the objection of the defendants, the schedules filed by them in the bankruptcy proceeding, and the testimony of an expert accountant based upon an examination of their banking books, which they had turned over to the trustee. The trial court, and, on successive appeals, the Superior Court and the Supreme Court of Pennsylvania (40 Pa. Superior Ct. 157, 163; 228 Pa. St. 400), overruled the contentions of the plaintiffs in error that their rights under the Constitution and laws of the United States were infringed by the admission of the evidence referred to, and so they bring the case here.

Article V of Amendments to the Federal Constitution is invoked, which provides (*inter alia*)—"No person . . . shall be compelled in any criminal case to be a witness against himself." But, as has been often reiterated, this Amendment is not obligatory upon the governments of the several States or their judicial establishments, and regulates the procedure of the Federal courts only. *Barron* v. *Baltimore*, 7 Pet. 243; *Spies* v. *Illinois*, 123 U. S. 131, 166; *Brown* v. *New Jersey*, 175 U. S. 172; *Barrington* v. *Missouri*, 205 U. S. 483; *Twining* v. *New Jersey*, 211 U. S. 78, 93.

We are referred to a similar prohibition in Art. I, § 9, of

the constitution of Pennsylvania; but, even if the trial of the plaintiffs in error proceeded in disregard of this provision, no Federal right was thereby infringed.

The only debatable question is that which is based upon the provisions of § 7 of the Federal Bankruptcy Act of July 1, 1898 (chap. 541, § 7; 30 Stat. 544, 548), which reads as follows:

"Duties of Bankrupts:—a. The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors

and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding: *Provided, however,* that he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence."

The reliance of the plaintiffs in error, of course, is upon that part of clause 9 of the section which declares—"but no testimony given by him shall be offered in evidence against him in any criminal proceeding." It is insisted that, in accordance with the spirit of the Fifth Amendment, this should be construed as applying to the schedule required to be prepared, sworn to and filed by the bankrupt under the provisions of the 8th clause. But as a matter of mere interpretation, we deem it clear that it is only the testimony given upon the examination of the bankrupt under clause 9 that is prohibited from being offered in evidence against him in a criminal proceeding. The schedule referred to in the 8th clause, and the oath of the bankrupt verifying it, are to be "filed in court," and, therefore, are of course to be in writing. The word "testimony" more properly refers to oral evidence. It was reasonable for Congress to make a distinction between the schedule, which may presumably be prepared at leisure and scrutinized by the bankrupt with care before he verifies it, and the testimony that he is to give when he submits to an examination at a meeting of creditors or at other times pursuant to the order of the court; a proceed-

ing more or less unfriendly and inquisitorial, as well as summary, and in which it may be presumed that even an honest bankrupt might, through confusion or want of caution, be betrayed into making admissions that he would not deliberately make. Full effect can be given to the clause "but no testimony given by him shall be offered in evidence against him in any criminal proceeding" by confining it to the testimony given under clause 9, to which the words in question are immediately subjoined. And we think that proper interpretation requires their effect to be thus limited.

We are referred to *Johnson* v. *United States*, 163 Fed. Rep. 30, and *Cohen* v. *United States*, 170 Fed. Rep. 715. But these were both prosecutions in the Federal courts on indictments for fraudulently concealing property belonging to the bankrupt's estate; and the decision in each case was rested upon Rev. Stat., § 860 (U. S. Comp. Stat., 1901, p. 661), which declares that "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; *provided*, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid." This section (since repealed by act of May 7, 1910, c. 216; 36 Stat. 352), was in force at the time of the trial of plaintiffs in error; but by its own terms it is limited to criminal proceedings "in any court of the United States," and constitutes no limitation upon the procedure of the state courts.

For the reasons given, it seems to us clear that the plaintiffs in error were not entitled to have the bankruptcy schedules excluded from evidence, because those schedules

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were not within the description of "testimony" in the clause quoted from § 7 of the Bankruptcy Act.

And for like reasons, the evidence showing the results of an expert examination of the books of the bankers was also admissible.

This conclusion renders it unnecessary for us to consider whether the prohibition with which we have dealt, that "no testimony given by him shall be offered in evidence against him in any criminal proceeding" is not limited to criminal proceedings in the Federal courts; and upon this question we express no opinion.

Judgments affirmed.